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## ARTICLE

### THE VICES OF VIRTUE: A POLITICAL PARTY PERSPECTIVE ON CIVIC VIRTUE REFORMS OF THE LEGISLATIVE PROCESS

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## INTRODUCTION

For most of our history, the legislative process, unlike the administrative and judicial processes,<sup>1</sup> has not been the focus of sustained legal scholarship. There are many reasons for the historical absence of equivalent legal attention. For one, the presumed legitimacy of popularly elected representation has probably obviated the need, in the eyes of many scholars, for the development of any general legal theory evaluating the constitutionality of internal legislative procedures or structures.<sup>2</sup> As a practical matter, moreover, many scholars have viewed the

<sup>1</sup> See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 336 (1985) ("Few [legal academics] study legislation as an object of systematic inquiry comparable to the common law."); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691 (1987) ("legal academe's approach to the systematic study of 'legislation' resembles Congress' attitude toward balancing the federal budget: everyone agrees that it is a good thing, but laments that it is not done"); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983) (statutory interpretation not systematically studied); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 892 (1982) (same). For a satirical criticism of this attitude, see Cohen, *On The Teaching of "Legislation,"* 47 COLUM. L. REV. 1301, 1303 (1947) ("To set up a quarantine in the law-school around [those skills needed by a lawyer within the legislature] on the ground that they deal with the 'political' and not the 'legal' would seem as unreal as to deny medical school students access to birth control films on the ground that they are 'immoral' and not 'scientific.'").

<sup>2</sup> Alexander Bickel is most closely associated with this view. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-20 (1962). This judicial deference finds expression in a variety of constitutional doctrines and decisions. The most noteworthy is the political question doctrine, which holds that it is inappropriate for the judiciary to pass judgment on issues when there is, among other things, a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1961); see also *id.* (listing numerous other factors relevant to the recognition of a political question). For applications of the political question doctrine, see *Davis v. Bandemer*, 106 S. Ct. 2797, 2806 (1986) (partisan gerrymandering is not a political question); *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969) (Congress's refusal to seat a duly elected representative is not a political question).

Similarly, the enrolled bill rule, which ordinarily precludes courts from examining the internal deliberations and journals of Congress to identify possible violation of constitutional and statutory procedures, reflects this hands-off attitude. See *Field v. Clark*, 143 U.S. 649, 670-73 (1892) (in reviewing the validity of a statute, courts will not look at congressional journals to determine whether Congress violated its procedures); cf. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir.) (relying on court's "discretion to withhold equitable and declaratory relief" to refuse to review method of committee assignments in Congress), *cert. denied*, 464 U.S. 823 (1983); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (challenge to federal statute based on passage in contravention of parliamentary rules held to be a nonjusticiable political question). But see *Yellin v. United States*, 374 U.S. 109, 114 (1963) (political question doctrine may not insulate violation of congressional procedures if individual rights are infringed); *United States v. Smith*, 286 U.S. 6, 32 (1932) (internal congressional procedures must be consistent with the Constitution). Under the Constitution, each House is entrusted with determining the rules of its own proceedings. See U.S. CONST. art. I, § 5, cl. 2.

worlds of politics and law as distinct and separate.<sup>3</sup> Those activities that often occupy politicians in the rough-and-tumble world of legislative and political life—logrolling, constituent-servicing, and public-posturing—have been considered quite foreign to, if not inconsistent with, the professional activities of judges, who, at least as an aspirational ideal, engage in reasoned development of the common law and the formulation and application of constitutional and statutory principles.<sup>4</sup> From this perspective, imposing the standards of the legal system upon legislative decisionmaking might lead to incoherent scholarship with little practical usefulness.<sup>5</sup>

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The immunity from lawsuit of members of Congress and their staffs under the speech or debate clause, U.S. CONST. art. I, § 6, cl. 2, also insulates certain legislative activities. See *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979) (speech or debate clause does not protect senator's newsletter because scope of the privilege is limited to the "deliberative process" and not the "informing function" of Congress); *Gravel v. United States*, 408 U.S. 606, 625 (1972) (speech or debate clause protects members of Congress and their aides engaged in "the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House"); *United States v. Brewster*, 408 U.S. 501, 525 (1972) (speech or debate clause forbids inquiry into acts and motivations that occur as part of the legislative process); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 123 (1810) ("The validity of a law cannot be questioned because undue influence may have been used in obtaining it.").

<sup>3</sup> For the clearest articulation of this view, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222-35, 253 (1976) (noting that the elected may be filled with "ignorance, sloth, gluttony, avarice, short-sightedness, political cowardice and ambition" and questioning the putative efficacy of "rationality" review); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 29 (Although many statutes lack a rational relationship to the "public interest," they should survive judicial scrutiny because they are "the product of the constitutionally created political process of our society.").

<sup>4</sup> See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) (describing the "process of legal reasoning in the field of case law and in the interpretation of statutes and the Constitution" as a "forum for the discussion of policy in the gap of ambiguity"); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1534 (1987) (judges "are not only removed from the political process but are also in positions that give them few incentives to slant their interpretations . . . in favor of regulated groups"); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744-45 (1982) [hereinafter Fiss, *Objectivity*] (interpretation by judges can be objective within a given legal interpretative community); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10, 14 (1979) [hereinafter Fiss, *Foreword*] (the perceived role of the legislature is to mirror the will of those who elected it; the task of the judiciary, which is not "a participant in interest group politics," is "to give meaning to constitutional values"); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (adjudication "gives formal . . . expression to the influence of reasoned argument in human affairs"). But see, e.g., J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 170-78 (2d ed. 1927) (interpretation is an art, not a science, less influenced by reason than by the feelings and emotions of the judge); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 770-73 (1982) (describing the inherent political nature of interpretation and adjudication).

<sup>5</sup> For an example of this view, see Posner, *supra* note 3, at 26-31. One possible

When the legal profession did scrutinize the internal mechanisms of the legislative process, moreover, in many cases the review was on a rather superficial level. In the influential legal process materials prepared by Henry Hart and Albert Sacks, legislative deliberations were generally presumed to be rationalistic and public-regarding.<sup>6</sup> Under their approach to statutory construction, for example, the courts were to examine the broad goals supposedly furthered by the legislation and then fill in technical language and statutory interstices with reference to these broad goals, much like a common law judge would fill in the nuances of developing doctrines by reference to the underlying purposes of earlier decisions.<sup>7</sup> Thus, to the extent that lawyers did examine the internal mechanisms of the legislative process and legislative materials, they often viewed them somewhat in the manner of a common law judge reviewing the opinions in prior cases—rationalistic and public-regarding.

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exception to this general approach is the views of the legal realists, who sought to understand and expose the seamier side of all legal processes, including the legislature. See W. RUMBLE, *AMERICAN LEGAL REALISM* (1968). The legal realists, however, did not seek to develop any clear guiding normative principles or offer any distinctly legal or structural solutions to the legislative problem. See L. FULLER, *THE LAW IN QUEST OF ITSELF* 59-64 (1940) (criticizing the legal realists for "assuming that a rigorous separation of *is* and *ought* is possible, and that one may study the law in isolation from its ethical context"). But see McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 *YALE L.J.* 827, 835 (1941) (legal realists "have sought to distinguish between the *is* and the *ought*, not for the purpose of ignoring or dismissing the *ought*, but for the purpose of making a future *is* into an *ought* for its time"); Schlegel, *American Legal Realism and Empirical Social Sciences: From the Yale Experience*, 28 *BUFFALO L. REV.* 459, 459-61 (1979) (those who denounce legal realism for its failure to find a solution ignore the historical significance of the movement).

<sup>6</sup> See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (10th ed. 1958). See generally *id.* at 1287-1380 (using Court cases to illustrate their method of statutory interpretation). As Bruce Ackerman observes:

[T]he legal process construction was plainly inadequate . . . Instead of building realistic, let alone rigorous, models of . . . legislative behavior, they were content with simplistic conceptions of these institutions. Although legal process scholars were perfectly aware that legislatures . . . made bad mistakes, these errors were treated as a series of isolated blunders, not the product of systematic failures. For each individual blunder, the job of the court was to engage the errant institution in Socratic dialogue, focusing the attention of legislators . . . on dimensions of the problem they somehow missed the first time around. The hopeful implication was that, under proper legal questioning . . . legislators would redeem their claims to democratic legitimacy.

B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 39-40 (1984). For a detailed description of the assumptions underlying the legal process approach, see Eskridge, *supra* note 4, at 1544-49; Eskridge & Frickey, *supra* note 1, at 694-734.

<sup>7</sup> See H. HART & A. SACKS, *supra* note 6, at 1410 (offering the "golden rule" of interpretation: judges decide what ought to be the meaning of a statute within the confines of a specific factual case setting).

This image within the legal community of pristine legislative deliberations paralleled a favorable view among economists of the proper functioning of government. Building on work by Arthur Pigou and Paul Samuelson, economists envisioned government as correcting market breakdowns caused by high transaction costs, information limitations, and collective action problems.<sup>8</sup> Since a major purpose of government was to achieve Pareto optimality,<sup>9</sup> government decisionmakers needed only to identify and ensure the appropriate production of public goods. Moreover, this process—ultimately a scientific one—was presumably best undertaken through rational deliberation by those entrusted with running government.<sup>10</sup> While the economic literature was perhaps more model-building than descriptive, the economic and legal process approaches complemented and reinforced each other rather well.

This picture of the legislative process, however, has been subjected to serious factual challenge—a challenge that is the subject of this Article. Based on the seminal work of George Stigler, many scholars (econ-

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<sup>8</sup> See generally A. PIGOU, *THE ECONOMICS OF WELFARE* 3-22 (4th ed. 1938) (outlining public good theory); Samuelson, *A Theory of Public Expenditure*, 36 REV. ECON. STATISTICS 387 (1954) (same). Ronald Coase's groundbreaking work was written to explore the circumstances in which these economic arguments for government intervention might not apply. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 42-43 (1960) (with zero transaction costs, efficient distribution of resources is achievable regardless of how the courts set the initial entitlement). Of course, this insight has been the subject of extensive legal comment and critique. See, e.g., Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 1, 4, 12 (1975) (noting that the assignment of rights can affect preferences and wealth and concluding that "welfare economics provides an ideological, and frequently objectionable, basis for policy guidance"); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 673 (1979) (the Coase theorem mistakenly assumes "that people treat 'opportunity cost' income and 'received' or 'realized' income in the same way"); Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387, 401-21 (1981) (concluding that "the notion of efficiency . . . has a limited heuristic usefulness"). See generally Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985) (criticizing the utilitarian approach to legal problems because it minimizes distributional effects and overlooks social values).

<sup>9</sup> Economic efficiency of government can be measured by several related criteria, including Pareto optimality and, in a somewhat looser sense, Kaldor-Hicks efficiency. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 12-15 (3d ed. 1986); Friedman, *Does Altruism Produce Efficient Outcomes? Marshall versus Kaldor*, 17 J. LEGAL STUD. 1, 1 (1988); Veljanovski, *The New Law-and-Economics: A Research Review*, in READINGS IN THE ECONOMICS OF LAW AND REGULATION 12, 19-20 (1984).

<sup>10</sup> See W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 17-24 (1965); R. MCKEAN, *EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS* 3-22 (1958); E. MISHAN, *ECONOMICS FOR SOCIAL DECISIONS* 12-13 (1973). For a description of this period, see Kennedy, *supra* note 8, at 389-98 (tracing the development of cost/benefit analysis from simple applications involving government administrative programs to broad theories of property entitlement and externality regulation).

omists and lawyers alike) began to examine a different side of legislative behavior—groups' and individual actors' pursuit of their self-interest, resulting many times in irrationally (and regressively) redistributive legislation.<sup>11</sup> The legal process ideal was thus criticized as naively unrealistic.<sup>12</sup> Indeed, in legal scholarship adopting this perspective, Frank Easterbrook and Richard Posner have directly challenged traditional approaches to statutory construction—the heart of the legal process materials. In their view, the narrowly self-interested motivations of legislative actors often undermine traditional techniques of statutory construction, which presuppose a public-regarding legislative body.<sup>13</sup> Thus, while legal academia once ignored the legislative process

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<sup>11</sup> See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("as a rule, regulation is acquired by [an] industry and is designed and operated primarily for its benefit"); see also Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 210 (1984) (presenting a statistical study of congressional voting trends and arguing that there is a principal-agent relationship between a legislator and those who "pay" for her services via votes or contributions); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976) (formalizing Stigler's "producer protection" view but noting that the market for legislation has built-in checks against increasingly powerful interest groups and redistribution in their favor); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335-36 (1974) (rejecting a public interest theory of legislation in favor of an interest group model favored by economists).

<sup>12</sup> See Posner, *supra* note 3, at 27.

<sup>13</sup> See Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984) [hereinafter Easterbrook, *Foreword*] (because congressional legislation often does not reflect an attempt to further a "public interest," but rather represents a compromise among special interest groups, a mode of statutory interpretation that always seeks to identify a public purpose and then broadly enforces it is illegitimate); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-43 (1983) [hereinafter Easterbrook, *Statutes' Domains*] (a judge's filling in the statutory gaps through judicial interpretation is incompatible with the private interest group process that often produced the legislation); Posner, *Statutory Construction—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819-20 (1983) [hereinafter Posner, *Statutory Construction*] (developing a typology of statutory construction based on whether the statute was the result of private interest compromise or public spirited activity); cf. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272-80 (1982) [hereinafter Posner, *The Reading of Statutes*] (describing the significance of "private" and "public" interest legislation to various issues of statutory construction). But cf. Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (while in form the judiciary is independent of interest group politics, it validates their efforts by interpreting statutes with an eye toward identifying specific legislative intent). This skeptical view of legislative deliberations is not limited to members of the University of Chicago law faculty. See, e.g., Fiss, *Foreword, supra* note 4, at 10 (the primary role of the legislature is to reflect the will and preferences of those elected); Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1336 (1987) ("legislative selflessness" is not "likely to obtain in the American polity or indeed in any robustly competitive, complex political system"). While many scholars have begun in turn to question the superficiality of the assumptions underlying this rather pessimistic literature, see *infra* note 36, it surely is the case that the views set forth in the Hart and Sacks materials no longer are

or viewed it as inherently legitimate, many quarters now perceive it as significantly flawed by the influence of narrow self-interested actors.<sup>14</sup>

In response to this special interest problem, scholarly commentary has varied on the proper judicial role. Some authors have simply described the judicial function as enforcing interest group "bargains."<sup>15</sup> As a positive matter, some have suggested that the courts should develop one system of legal analysis when legislatures are supposedly acting in their "private-regarding" mode and another when they are "public-regarding," assuming it is possible to distinguish between the two.<sup>16</sup> This approach, however, tends to be both amoral and passive, seeking merely to adopt a legal standard that mirrors the perceived operation of the legislative process.

In light of this pessimistic view of legislative deliberations, and in part perhaps as a reaction to the passivity of other approaches, legal academics have expressed renewed interest in *improving* the performance of legislative decisionmaking through judicial review.<sup>17</sup> Much of this effort<sup>18</sup> has been directed at formulating ways in which legislative

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dominant.

<sup>14</sup> At the same time as the legal profession was questioning the motivation of legislative actors, public choice experts began to question the ability of scholars or judges to construct a rational system of legislative procedures. The basis of these criticisms was, of course, the work of Kenneth Arrow, who, along with others, demonstrated that, given a particular distribution of preferences within a legislative population, consistent results could not be assured; the person or persons who controlled the agenda determine the outcome. Thus, legislative procedures were viewed not only as potentially pernicious (or at least private-regarding), but also as irrational. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59-60 (1951); see also *infra* note 163 (noting situations where this problem may not be as serious as previously thought).

<sup>15</sup> See Landes & Posner, *supra* note 13, at 879; cf. Easterbrook, *Statutes' Domains*, *supra* note 13, at 547 (unless a statute provides otherwise, the role of the court in interpreting a provision is to apply it only in circumstances clearly anticipated by the legislature, which "is faithful to the nature of compromise in private interest legislation").

<sup>16</sup> See Easterbrook, *Foreword*, *supra* note 13, at 46; Posner, *Statutory Construction*, *supra* note 13, at 818-20; Posner, *The Reading of Statutes*, *supra*, note 13, at 269-72. Obviously, the question of mixed motives—both of an individual and of different people and groups within a legislature—complicates this dichotomy immensely, perhaps irreparably. See *infra* notes 98-109 and accompanying text.

<sup>17</sup> To some extent, one can view traditional doctrines of judicial review as serving generally to displace legislative decisionmaking by "supplanting" its judgments in certain specified circumstances by reference to substantive values located in the Constitution. See Linde, *supra* note 3, at 203; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980). The new effort is distinguishable from the courts' traditional role in that it does not appear to question outcomes per se, but rather seeks to transform in a comprehensive manner general legislative motivation.

<sup>18</sup> A variety of authors fall into this category. See Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 772-75 (1987); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223,



actors—principally representatives, but sometimes their constituents as well—can be made more “public-regarding” or “civically virtuous” on a day-to-day basis.<sup>19</sup> Civically virtuous legislators are thus similar to those legislators presupposed by the Hart and Sacks materials, except the courts are now faced with transforming actual representatives into this legislative ideal.

At the same time as these intellectual efforts were underway, political scientists and economists were pursuing parallel strategies. While early economists noted the perverse incentives created by group activity,<sup>20</sup> new efforts have focused on the circumstances in which mutually

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240-50 (1986); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 866-76 (1980) [hereinafter Mashaw, *Constitutional Deregulation*]; Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 506-11 (1979); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1566-76 (1983); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985) [hereinafter Sunstein, *Interest Groups*]; Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693-1704 (1984) [hereinafter Sunstein, *Naked Preferences*]; Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 129-38 [hereinafter Sunstein, *Public Values*]; C. Sunstein, *Beyond the Republican Revival* 54-68 (Dec. 22, 1987) (forthcoming in 97 YALE L.J.); cf. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713-17 (1984) (arguing for an invigorated contract clause review to invalidate certain legislation passed as a result of interest group pressures); Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-28, 788 (1986) (explaining heightened federal scrutiny of state antitrust regulation as a consequence of greater judicial awareness that such regulation typically benefits private interests at the expense of the public). Other articles have discussed the use of statutory construction or judicial intervention to inject into the legislative agenda political issues that would not otherwise be considered. See, e.g., Mashaw, *A Comment on Causation, Law Reform, and Guerilla Warfare*, 73 GEO. L.J. 1393, 1395-96 (1985); Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 714-25 (1986); cf. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163-66 (1982) (proposing the invalidation of obsolete statutes when they are based on principles that are no longer part of the legal framework).

Some civic virtue writers, such as Ackerman, do not seek to transform the daily deliberations of legislative actors but rather advocate judicial enforcement of those substantive ideals supposedly adopted by the populace when it periodically enters into a higher level of dialogue. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1030, 1044-51 (1984).

<sup>19</sup> The exact meaning of these terms will be developed in more detail below, but a public-regarding legislator is sensitive to arguments based on principle, that is, arguments geared toward improving society as a whole, rather than merely based on a selfish desire of the particular political actor or group to advance her or its own particular interests alone within the society.

<sup>20</sup> In his now classic exposition, Mancur Olson argued that, all things being equal, as group size increased, individual members were often less likely to work for group interests. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 36 (1965) [hereinafter M. OLSON, *COLLECTIVE ACTION*]; cf. Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-45 (1968) (suggesting how individual and group interests diverge in the environmental context). But cf. R. HARDIN, *COLLECTIVE ACTION* 38-49 (1982) (qualifying the conclusion about group size in certain factual settings). Olson has recently applied this insight to explain the inefficiency of governments dominated by nar-

cooperative arrangements can develop,<sup>21</sup> not only in the classroom and the laboratory,<sup>22</sup> but in the cloakroom as well.<sup>23</sup>

In this Article, I wish to raise a caveat to the general direction of the public-regarding or civic virtue approach as it applies to reform of the legislative process. The civic virtue literature, which parallels efforts in other legal contexts to facilitate rational dialogue,<sup>24</sup> would im-

row interest groups. See M. OLSON, *THE RISE AND DECLINE OF NATIONS* 17-19, 29-34, 47-53 (1982) [hereinafter M. OLSON, *RISE AND DECLINE*].

<sup>21</sup> The political economy literature focuses not on making representatives public-regarding *per se*, but rather on forming arrangements so that private-regarding activity will not lead to free rider problems or prisoners' dilemmas. See *infra* note 51 (explaining the prisoners' dilemma).

<sup>22</sup> Through computer game theory experiments, Robert Axelrod shows that a "tit for tat" strategy is likely to elicit mutually beneficial cooperation. See R. AXELROD, *THE EVOLUTION OF COOPERATION* 27-54 (1984). Thus, the "single property which distinguishes the relatively high-scoring entries from the relatively low-scoring . . . is the property of being *nice*, which is to say never being the first to defect." *Id.* at 33.

More generally, in a full evaluation of different models of interest group activity, Russell Hardin identifies various characteristics of successful collective action, including individuals not acting in a narrowly self-interested manner; entrepreneurial politicians who perceive responding to mass sentiment as being consistent with their personal career goals; an asymmetrically composed group that includes wealthy benefactors; and groups with ongoing interactions and relations. See R. HARDIN, *supra* note 20, at 125-37.

<sup>23</sup> A variety of authors have begun to examine the historical circumstances in which activity that appears truly public regarding has been undertaken by political representatives. See M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* 253-54 (1985) (factors such as "the rise of the mass media, the decline of political parties as organizations capable of electing or controlling officeholders, the growth of analytical staffs in both legislative and executive branches, and the decentralization and democratization of power in Congress" may have encouraged more public-regarding legislators); S. KELMAN, *MAKING PUBLIC POLICY* 231-47 (1987) (citing deregulation and protectionism as examples of "public spirit" rather than "the dominance of self-interest"); A. MAASS, *CONGRESS AND THE COMMON GOOD* 5 (1983) ("government conducts a process of deliberation and discussion that results in decisions that are based on broader community interests, and it designs and implements programs in accordance with these decisions"); D. ROBYN, *BRACING THE SPECIAL INTERESTS* 1-11 (1987) (the historical factors of "a highly inflationary economy, greater intellectual acceptance of the competitive-market ideal, and the rise of a consumer movement followed by the mobilization of business interests" enabled members in Congress to forsake their usual system of catering to special interests and focused constituencies); see also S. VERBA & G. ORREN, *EQUALITY IN AMERICA: THE VIEW FROM THE TOP* 248 (1985) (A "central theme of this study . . . is that values and the conflict over values play an important part in determining the nature and extent of equality [in America].").

<sup>24</sup> See, e.g., B. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 4-6, 358-59 (1980); R. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* 124-43 (1979); G. CALABRESI, *supra* note 18, at 163-81; R. DWORKIN, *LAW'S EMPIRE* 225-75 (1986); Fiss, *Foreword*, *supra* note 4, at 13; Fiss, *Objectivity*, *supra* note 4, at 754-55. See generally Weisberg, *supra* note 1, at 241-49 (reviewing some of these writers and discussing the emergence of dialogue as a description of what he calls "the new legal process"). While most of this literature concerns rational dialogue between judges, or between judges and litigants or legislators, one can extend the normative insight to legislative deliberations. For earlier analyses of dialogue between courts and legislatures, see A. BICKEL, *supra* note 2, at 26; Bickel & Welling-

pose a legal model of rational public-regarding decisionmaking on the legislative arena in order to help alleviate the problem of special interest groups. Scholars no longer view the legal process as separate from politics, but rather as its solution. Whatever the usefulness of this mode of decisionmaking elsewhere, however, there are serious questions whether many of these wholesale efforts to stimulate moral dialogue within day-to-day legislative deliberations will ultimately improve the quality of our public policy. Indeed, as suggested below, the substance of legislative decisions may actually deteriorate if the new legal process writers extend their current focus to its logical conclusions.

In developing this argument, I rely upon a distinctly different literature on the legislative process—the political science scholarship emphasizing the positive role of political parties, referred to below as the “political party approach.” With some important exceptions discussed below, writers in this tradition place primary reliance on centralization of power as the most positive mechanism for minimizing the effect of special interest groups. Of course, no one scholar embraces all of the specific proposals that various individual political party authors have put forward for concentrating power, especially in light of the important pluralistic and antityrannical goals that may not be protected by this approach. This general perspective, however, does highlight the extent to which many academics, writing in the historical mainstream of political science, adopt a distinctly different approach from the new civic virtue writers. Indeed, not only may these two traditions paint different visions for reform, but pursuit of the “public-regarding view” might actually undermine the efforts and goals of those mechanisms, such as a strong president and strong political parties, traditionally relied on to limit the perverse effect of self-interested public actors.

To summarize the thesis, many of the doctrinal changes being advanced by civic virtue writers in order to stimulate greater public-regarding activity will, if extended to their logical conclusion, most likely disperse political power and insulate government actors from popular control.<sup>25</sup> Unfortunately, this approach, which is quite different from the centralization strategy advocated by political party proponents, may well have the perverse effect of enhancing the influence of narrow self-

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ton, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 14-35 (1957); Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1559-66 (1963); see also Cover & Aleinikoff, *Dialectical Federalism*, 86 YALE L.J. 1035, 1052-60 (1977) (discussing how dialogue between state and federal judges is engendered by federal habeas corpus).

<sup>25</sup> See *infra* notes 168-79 and accompanying text.

interested groups.<sup>26</sup> Moreover, the ideological discussion that civic virtue writers seek to stimulate may disadvantage poor and less educated groups by reducing their ability to exercise popular control over political developments. These changes also may impede the ability of government to undertake effective action—a conservative bias these writers presumably eschew.<sup>27</sup> Indeed, while precise predictions are hazardous, past reform movements in Congress aimed at increasing the insulation and independence of individual members of Congress have tended to have this precise effect—enhancing the collective influence of narrow self-interested actors and reducing the ability of Congress to take coordinated action.<sup>28</sup> In short, the civic virtue reforms may well have a result contrary to what is intended.

Organizationally, Part I outlines the specifics of the special interest group problem. Part II sketches the solutions to this difficulty offered in the new civic virtue literature. Part III summarizes the principal elements of the traditional political science approach to the problem of special interest groups. Part IV examines the theoretical tensions between the civic virtue and political party strategies, while Part V discusses various historical and analytical reasons for concern with any singular pursuit of the new civic virtue solution. Finally, Part VI explores other drawbacks with wholesale adoption of the civic virtue approach in terms of government effectiveness and reduced protection for the poor. The conclusion briefly discusses two possible systems, worthy of further investigation, that seek to stimulate greater virtue without dispersing collective responsibility.

The purpose of this effort is two-fold. First, as an academic matter, it seeks to highlight and illustrate the central difference in overall theoretical perspective between the civic virtue and the political party literature, in much the same spirit in which A.O. Hirschman contrasted the reform traditions in economics and political science in his powerful work, *Exit, Voice and Loyalty*.<sup>29</sup> Second, in undertaking this

<sup>26</sup> See *infra* notes 185-205 and accompanying text.

<sup>27</sup> See *infra* notes 238-47 and accompanying text.

<sup>28</sup> See *infra* notes 206-26 and accompanying text.

<sup>29</sup> See A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970). In developing this argument, this Article will attempt to draw together some of the common threads and insights of the legal writing on civic virtue as it applies to the reform of the legislative process. Because much of this literature is still at a formative stage, in some instances the Article will discuss only its general policy direction or attempt to extend proposals to their most probable conclusion. Unfortunately, this approach may not do justice to the specific recommendations and views of particular authors.

In addition, I will focus solely on those students of civic virtue who seek to explore the practical but immensely important question of how to structure legislative institutions so as to elevate the motivation of political actors through reasoned dialogue. The extensive literature examining the historical origins of different forms of civic virtue is

comparison, the analysis is intended to contribute to, and perhaps help to shape, a legal literature that is still at a nascent stage.

In general, civic virtue offers a peculiarly legal solution to a problem that has perplexed economists and political scientists—special interest groups and externalities. In the tradition of the legal process school, civic virtue writers seek to solve these and other difficulties through the imposition of a rational dialogue. This dialogue is designed to induce legislative actors to be considerate of the interests and aspirations of those outside their group or constituency, as well as to examine and understand better their own goals and aspirations. Those who wish to pursue the civic virtue strategy, however, must come to grips with the theoretical and historical insights of political science, which suggest that this approach has the potential for making matters worse.

## I. THE SPECIAL INTEREST GROUP PROBLEM

In recent years, lawyers, political scientists, and economists have increasingly directed their attention to what they perceive as the inadequate and sometimes perverse performance of the legislative process. Not all of the criticisms of the process adopt the same perspective or even are consistent. Nevertheless, many of these analyses develop a common theme: the disproportionate influence of so-called narrow self-interested groups in legislative decisionmaking, all at the expense of the broad diffuse public interest.

While few academics, let alone politicians, explain with any rigor exactly what is meant by the term "special interests" (or, for that matter, what is meant by its contrapositive, the "public interest"), three aspects of many of these groups raise concern. First, and foremost, special interests are often disproportionately self-interested; they are concerned primarily with promoting the interests of members of their particular group, rather than with promoting the "broader public interests."<sup>30</sup> What is meant by pursuing the interests of society as a

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beyond the purview of this Article. See, e.g., D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); Berthoff & Murrin, *Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, in *ESSAYS ON THE AMERICAN REVOLUTION* (1973). So too is the theoretical examination by various legal and other philosophers attempting to understand the many nuances of abstract dialogue and human interaction. See, e.g., 1 J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY* (T. McCarthy trans. 1984); J. HABERMAS, *THEORY AND PRACTICE* (J. Viertel trans. 1973); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

<sup>30</sup> Macey, *supra* note 18, at 223. Certainly not all or even most groups are wholly

whole is far from clear; in most contexts, it appears to mean that decisions are made on the basis of so-called "reasoned or principled arguments," rather than on arguments advanced "merely" as a response to power or to personal advantage.<sup>31</sup> Thus, a principled discussion might properly lead to advancement of the interests of the participants or their constituents, but only because they have been motivated in their decisionmaking by pursuit of the social good and not by self-interest or their own power.

In addition to being disproportionately self-interested, special interests also suffer from a second normative problem: they are narrow, that is, they speak for only a small segment of the democratic polity. Although few lawyers (let alone political economists) who criticize our democratic institutions present a sustained defense of majority rule, most usually presume that rule by a substantial majority of the eligible voting population is preferable over the long run to rule (or effective rule) by a very narrow subset of the population.<sup>32</sup> This understanding obviously enjoys constitutional underpinnings. While the Constitution protects a variety of minority groups and interests in specific contexts, as a general matter, "[m]inorities are *supposed* to lose in a democratic system . . . ."<sup>33</sup> Thus, to the extent that they are influential, the nar-

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self-interested. There appears instead to be a continuum of different levels of legislative motivation. See *infra* note 100. At this point, this Article seeks only to identify an ideal type.

<sup>31</sup> This description masks some differences among the proponents of this view. In some instances, civic virtue is described as making decisions *in the absence of* political pressure or power. See Macey, *supra* note 18, at 229 n.29. Elsewhere it is described in the positive sense of making decisions on the basis of principle or deliberation. See Sunstein, *Interest Groups*, *supra* note 18, at 58. The two processes are not necessarily the same.

<sup>32</sup> A. BICKEL, *supra* note 2, at 16-17; Macey, *supra* note 18, at 225-26. For a discussion of some of the problems with majority rule, see *infra* notes 163-66 and accompanying text.

<sup>33</sup> Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 (1985). The Court has apparently attempted to protect majority rule most directly in the one person/one vote and gerrymandering decisions, in which each individual is held entitled to an "effective and adequately weighted vote." *Reynolds v. Sims*, 377 U.S. 533, 581 (1964); see also *Davis v. Bandemer*, 106 S. Ct. 2797 (1986) (political gerrymandering can result in unconstitutional vote dilution); *Karcher v. Daggett*, 462 U.S. 725 (1983) (establishing a rigorous standard of numerical equality of population in congressional redistricting); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (enunciating the principle of one person/one vote). But see *Ball v. James*, 451 U.S. 355 (1981) (water district can deviate from one person/one vote rule); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (water storage district can limit voting rights to landowners and apportion votes among landowners according to the number of acres owned). There is a rich literature examining whether and to what extent these decisions necessarily further majority rule. See, e.g., Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1074-76 (1980) (arguing that the Court's remedy for malapportionment—reapportionment guaranteeing equally populated districts—does not guarantee majority rule); Lowen-

row nature of special interest groups threatens majority rule.

This leads to the third and related normative concern with special interest groups: they can be quite powerful. As a variety of political and economic scholars have pointed out, the polity suffers from serious collective action problems that afford disproportionate influence to narrow concentrated interests.<sup>34</sup> These problems are exacerbated in the legislative process, since individual legislators lack an incentive to work for issues or projects that redound to the public in general (especially voters outside their district). They are therefore more likely to respond

stein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 6-7 & n.16 (1985) (same (citing Bernoulli's theorem)); Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 177-82 (1984) (examining the tension in *Reynolds* between group and individual rights); see also *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 750 n.12 (1964) (Stewart J., dissenting) (equally populated districts nonetheless permit minority rule). The issue is further complicated by the divergent and shifting preferences of individual voters and their group allegiances. See, e.g., Baker, *supra*, at 1078; Schuck, *supra* note 13, at 1373. In addition, any system of majority rule, once the majority representatives are selected, almost by definition "devalues" the weight of the losing minority voters. See Grofman & Scarrow, *The Riddle of Apportionment: Equality of What?*, 70 NAT'L CIVIC REV. 242, 247 (1981); Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 265 (1985); Lowenstein & Steinberg, *supra*, at 14 n.36.

<sup>34</sup> For example, where the opposition to (or support for) particular programs is spread diffusely across the public at large and the support for (or, alternatively, opposition to) such programs is concentrated in a particular group, individual members of the public—and therefore "the public" in general—do not have strong incentives to inform themselves or lobby on the particular issues, even though (from a social sense) the costs of the project might outweigh the benefits by a wide margin and/or the majority of the population would favor the projects. With respect to the public at large, the diffuse impact of the costs means that each individual member lacks the proper incentive to obtain the information or, even if she has the information, to expend effort on behalf of the particular project, because of its modest individual effect. This, coupled with the incentive to free ride as the group becomes larger, means that such interests are less likely to find organizational expression. Narrowly concentrated interests, which are less subject to such perverse incentives, will be more likely to find organizational support.

Olson was the first to explore this problem in detail. See M. OLSON, *COLLECTIVE ACTION*, *supra* note 20, at 43-52; see also J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 38 (1962) ("individuals may be expected to be somewhat less rational in collective than in private choices"); R. HARDIN, *supra* note 20, at 42-49 (examining the effect of group size on the ability to achieve group objectives); cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 497 (3d ed. 1986) (noting the existence of "free-rider" problems in which an individual (or firm) who is "within the protective scope of some proposed piece of legislation will benefit from its enactment whether or not he makes any contribution, financial or otherwise, to obtaining its enactment").

Numerous authors have since attempted to expand and supplement this theory into a richer typology of interest group power, recognizing the circumstances in which ideological and other motivations can become the basis for group action. See, e.g., R. HARDIN, *supra* note 20, at 101-24; M. HAYES, *LOBBYISTS & LEGISLATORS: A THEORY OF POLITICAL MARKETS* 64-127 (1981); J. WILSON, *POLITICAL ORGANIZATIONS* 327-45 (1973); Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 357-72 (J. Wilson ed. 1980); Schuck, *The Politics of Regulation* (Book Review), 90 YALE L.J. 702, 723 (1981) (reviewing *THE POLITICS OF REGULATION*).

to those interests, usually geographically concentrated, that concern their districts.<sup>35</sup> The result is often—though certainly not always<sup>36</sup>—narrowly concentrated interests exercising disproportionate influence, even though the vast majority of the population, if it took the time and expense to educate itself on all issues and to exercise its voice, might often reject many of the policies that result from this process.

Despite these concerns, a variety of arguments have historically been offered in favor of influence by special interest groups. Many economists, of course, have suggested that the partisan, self-interested motives of individual actors in the *private* sector can promote at least some of the goals of society as a whole.<sup>37</sup> Political scientists, writing in the pluralist tradition, have also maintained that an analogous phenomenon operates within the political process, where countervailing politi-

<sup>35</sup> See L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 92-105 (1979); M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 56-70 (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-61 (1974).

<sup>36</sup> There is a growing literature questioning the magnitude of this problem or at least exploring circumstances in which this bias has been and can be overcome. For discussion by lawyers, see Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-901 (1987); Hazard, *Principles in Legislation*, 41 REC. B. CITY N.Y. 685, 691-93 (1986); J. Mashaw, *Positive Theory and Public Law* 44-51 (Feb. 3, 1986) (on file with the *University of Pennsylvania Law Review*). For examinations by political scientists, see M. DERTHICK & P. QUIRK, *supra* note 23, at 237-58; S. KELMAN, *supra* note 23, at 60-66; A. MAASS, *supra* note 23, at 64-74; D. ROBYN, *supra* note 23, at 234-57; S. VERBA & G. ORREN, *supra* note 23, at 248; Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74-1 AM. ECON. REV. 279, 279-98 (1984). Of course, one can view a great deal of so-called public spirited activity as also serving the interests of various groups and the resulting legislation as being passed or amended partly at their instigation. See B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 1-4, 54-57 (1981) (aspects of the Clean Air Act, while perceived as public-serving, in fact served the interests of certain industrialists); Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985) (first significant federal statutes regulating air pollution passed at instigation of well-organized industrial groups); see also R. HARDIN, *supra* note 20, at 117-24 (discussing complex balance of interests behind environmental and civil rights movements); R. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 41-44, 58-60 (1986) (discussing the influence of the automotive and airline industry on the development of transportation policy for the elderly and handicapped); R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 155 (1983) (much of the deregulation of the early 1980's, while ostensibly designed to protect consumers, in fact aided the special interests involved).

<sup>37</sup> As Adam Smith first proclaimed, through a division of labor and an appeal to the "self-love" of the individual, individuals and small groups are able to increase the productivity and, therefore, the wealth of themselves and the nation. See 1 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 1-16 (E. Cannan ed. 1966) (5th ed. 1789). For a philosophical defense of market behavior, see R. POSNER, THE ECONOMICS OF JUSTICE 60-87 (1983) (suggesting link between increased wealth of society as a whole and social justice).



cal interests, through a process of representation, pressure and accommodation,<sup>38</sup> adopt a public policy package sensitive to the interests and needs of society as a whole.<sup>39</sup> Indeed, recent economic literature has attempted to merge these two traditions.<sup>40</sup> While a variety of principles might be offered in defense of this analysis, in many respects it purports to be more sensitive, in comparison to its more democratic competitors, to the intensity of social interests,<sup>41</sup> rather than merely to an aggregation of their numerical support.

Despite these more traditional defenses, however, there remains a troubling consensus that the invisible hand does not solve the legislature's problems of legitimacy. The cumulative effect of self-interested motivation, narrow focus, collective action disincentives, and potential bias toward wealthier groups and interests continues to undermine the legislature's authority. While legal scholarship once focused on the bias

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<sup>38</sup> This process, labeled "partisan mutual adjustment," refers to a decentralized decisionmaking and policymaking system that consists of interdependent decisionmakers making rational and therefore coordinated decisions to achieve incrementally accommodating policies. C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 3-34, 87-101 (1965).

<sup>39</sup> See A. BENTLEY, *THE PROCESS OF GOVERNMENT* 447-59 (1967); R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 141-45 (1956); D. TRUMAN, *THE GOVERNMENTAL PROCESS* 501-35 (1951).

<sup>40</sup> See Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372-73 (1983). Like the pluralists, Becker appears to downplay the pervasive effect of transaction costs in ensuring organizational parity between different groups in the general population. For an earlier attempt to reconcile these two traditions, see A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 282-94 (1957).

<sup>41</sup> The exact meaning of the intensity of overall support is unclear, since it ultimately presumes the ability to make interpersonal utility comparisons. Economists and philosophers have had serious debates over this issue, both as a technical as well as a normative matter. On the difficulties in measuring utility, especially between individuals, see, e.g., A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 64 (2nd ed. 1984); J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 127, 139 (1977); B. WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 100-03 (1972). On the normative difficulties in basing moral judgments merely on summations of group happiness, thereby ignoring the individual as something deserving of intrinsic worth, see, e.g., J. MACKIE, *supra*, at 145, 147. See generally J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* (1973) (discussing the merits of utilitarianism). Of course, a separate debate has ensued over whether wealth maximization is a normatively attractive goal. Compare Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 194 (1980) (the goal of maximizing social wealth is mistakenly premised on the personification of society) with Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104-11 (1979) (economic analysis is helpful in making ethical decisions). Most people probably agree, however, that the political system should take account of different intensities of interest within the population, in at least some cases. See J. BUCHANAN & G. TULLOCK, *supra* note 34, at 125 (noting distinctions between intensity and numerical aggregation of support); Komesar, *Housing, Zoning, and the Public Interest*, in B. WEISBROD, J. HANDLER & N. KOMESAR, *PUBLIC INTEREST LAW—AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 218, 221 (1978) (labeling the distinctions as majoritarian and influence models).

of the majority as perhaps the central dilemma of constitutional law,<sup>42</sup> now the bias and power of narrow special interests groups may have become a greater constitutional worry.<sup>43</sup>

## II. THE CIVIC VIRTUE PERSPECTIVE

In light of the special interest concern, several legal academics recently have offered a variety of reform proposals to combat the first element of the special interest group equation—the disproportionately self-regarding motivation of many representatives and/or their constituencies. This concern over the self-interest component of special interest groups can probably be traced to *A Theory of Justice*,<sup>44</sup> in which John Rawls' heuristic and analytic device, the original position, seeks to imbue public decisionmakers with civic virtue so that they may better deliberate on the structure of a just society.<sup>45</sup> According to Rawls, a group of individuals, if placed behind a "veil of ignorance," would not know their place in society or even their preexisting values or belief systems, which historical experience has shown often support the individual's desired social position.<sup>46</sup> As a result, with self-interest having been excised from social decisionmaking, they would be in a position to agree on a just structure for society.

Along similar lines, a number of philosophical and legal writers have recognized the value of rational dialogue, undertaken in the absence of a veil of ignorance, as a normatively attractive system for reaching ethical public decisions.<sup>47</sup> Ideally, intellectual exchange should assist participants to understand and reach agreement on factual and ethical differences, as well as shape their own values toward normatively attractive ends.<sup>48</sup> From Ackerman to Fiss to Michelman, from

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<sup>42</sup> See A. BICKEL, *supra* note 2, at 16-32; J. ELY, *DEMOCRACY AND DISTRUST* 71 (1980).

<sup>43</sup> See Ackerman, *supra* note 33, at 745-46; Bruff, *Legislative Formality and Administrative Rationality*, 63 TEX. L. REV. 207, 213-18 (1984); Posner, *The Reading of Statutes*, *supra* note 13, at 266. Within this literature, there is disagreement over exactly what general normative principle is being contravened by the power of special interest groups. One can probably view a system of strong special interest groups as contravening, in a very loose sense, majority rule, Pareto optimality, Kaldor-Hicks efficiency, utilitarianism, and/or some alternative normative principle of rational dialogue.

<sup>44</sup> J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>45</sup> See *id.* at 11-22.

<sup>46</sup> See *id.* at 136-42.

<sup>47</sup> See, e.g., B. ACKERMAN, *supra* note 24, at 4-6, 358-59; R. BURT, *supra* note 24, at 124-43; G. CALABRESI, *supra* note 18, at 96-98, 163-81; R. DWORKIN, *supra* note 24, at 225-75; Fiss, *Objectivity*, *supra* note 4, at 754-55; Fiss, *Foreword*, *supra* note 4, at 13.

<sup>48</sup> See Michelman, *supra* note 18, at 509; Stewart, *supra* note 18, at 1566-76; Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1154-

institutional litigation to child custody disputes, rational dialogue has been offered as a legitimate basis for helping to resolve disputes and make public decisions.<sup>49</sup>

Indeed, even economists, while operating from an entirely different conceptual framework, have recognized that a public-regarding motivation—altruism—can be an important device for overcoming the perverse incentives of individuals who ignore, and are not held accountable for, the external consequences of their actions.<sup>50</sup> In this sense, altruism can overcome the “prisoners’ dilemma” inherent in political and economic externalities, though without the typical economic solution of self-interested actors having to surmount transaction costs and reach binding enforceable agreements or undertake so-called “tit-for-tat” strategies.<sup>51</sup>

58 (1986); Tribe, *supra* note 8, at 595.

<sup>49</sup> See B. ACKERMAN, *supra* note 24, at 4-6, 358-59; R. BURT, *supra* note 24, at 124-43; Fiss, *Foreword, supra* note 4, at 13; Fiss, *Objectivity, supra* note 4, at 754; Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32-33 (1986).

<sup>50</sup> See, e.g., Becker, *Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology*, 14 J. ECON. LIT. 817, 818-26 (1976) (outlining an economic model of how altruism might develop that incorporates sociobiological principles and individual rationality); Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 848-54, 859-62 (1980) (discussing altruism as one mechanism for overcoming market breakdown in those markets in which nonprofit enterprise has arisen); Kolm, *Altruism and Efficiency*, 94 ETHICS 18 2728 (1983) (reviewing economic advantages of altruistic behavior). But see Wintrobe, *It Pays to Do Good, But Not to Do More Good than It Pays: A Note on the Survival of Altruism*, 2 J. ECON. BEHAV. & ORG. 201, 212 (1981) (criticizing Becker’s theory of how altruism might develop). In a series of psychological experiments, Elizabeth Hoffman and Matthew Spitzer have found that, contrary to predictions based on a utilitarian model of self-interested human behavior, experimental subjects distributed gains according to their perceptions of fairness and distributive justice, not legal entitlements. See Hoffman & Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects’ Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259, 259-62 (1985). For a discussion of the possible evolutionary benefits to the group or species of various ethical norms, see Rubin, *Evolved Ethics and Efficient Ethics*, 3 J. ECON. BEHAV. & ORG. 161, 165-68 (1982). See generally E. WILSON, *ON HUMAN NATURE* 5 (1978) (one form of altruism, respect for other citizens’ social rights, may stem from innate “motivators” in the brain); H. MARGOLIS, *SELFISHNESS ALTRUISM AND RATIONALITY* 4 (1982) (developing an equilibrium of human behavior, balancing group and self-interest motives).

<sup>51</sup> See Harrison, *Strategy and Biology: The Continuing Interest in Self-Interest* (Book Review), 86 COLUM. L. REV. 213, 216-17 (1986) (reviewing R. AXELROD, *supra* note 22; J. BECKSTROM, *SOCIOBIOLOGY AND THE LAW* (1985)). As lawyers now recognize, the prisoner’s dilemma offers a game theory demonstration of how private short-term advantage and long-term public interests can diverge. Under the common scenario, two partners in crime are offered separate collusive deals by the prosecutor for reduced sentences if they squeal on their compatriot. If both capitulate, however, they will each receive enhanced sentences. Even though they will be better off agreeing to stonewall the government, their private incentive, assuming they are unable to reach a prior agreement, is to confess. The result, paradoxically, is that they both are worse off by following their narrow self-interest. See R. HARDIN, *supra* note 20, at 2. For a

While this disparate group of scholars all accept some type of dialogue or altruism as a legitimate technique for improving public decisionmaking, legal scholars have been less certain as to how to stimulate such motivation among political representatives. The approaches can be usefully divided into two categories. The first includes the "new" civic virtue writers, typified, and perhaps led, by Cass Sunstein, who are attempting to transform the motivations of day-to-day political actors through changes in judicial review and legislative structure intended to stimulate debate and dialogue in Congress. The second, included here only for comparative purposes, covers those scholars who rely on the traditional constitutional technique of a temporal veil of ignorance to transform long-term legislative motivation. The first approach is the focus of this Article's critical analysis.

### A. *The New Civic Virtue Writers*

Cass Sunstein has clearly provided the most extensive, important, and comprehensively developed scholarship in this first category, detailing a variety of legal doctrines that could facilitate rational debate.

The first and most important is direct judicial review of legislative decisionmaking. In a series of pieces, including a forthcoming *Yale Law Journal* article,<sup>52</sup> Sunstein argues that the Court should invalidate legislation that is "an exercise of political power by the advantaged class," rather than a "deliberative" exercise of "principle" or "public interested judgment."<sup>53</sup> Previously, Sunstein maintained that several constitutional provisions—including the contracts, privileges and immunities, due process, takings, and equal protection clauses—impose this type of condition in specific contexts.<sup>54</sup> In his latest expositions, Sunstein urges the courts to adopt this as a general constitutional requirement of legislative decisionmaking. Sunstein's approach is thus notable in its call for a comprehensive and fundamental transformation of legislative deliberations, rather than merely heightened standards of review when discrete values or interests are threatened.<sup>55</sup>

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description of how the problem of public goods can be conceptualized as a prisoner's dilemma, see *id.* at 25-30.

<sup>52</sup> C. Sunstein, *supra* note 18.

<sup>53</sup> See Sunstein, *Interest Groups*, *supra* note 18, at 69; C. Sunstein, *supra* note 18, at 15, 58.

<sup>54</sup> See Sunstein, *Naked Preferences*, *supra* note 18, at 1689-90; see also Sunstein, *Public Values*, *supra* note 18, at 128 (suggesting that the function of the equal protection clause is to "prohibit unprincipled distributions of resources and opportunities").

<sup>55</sup> In proposing a motivational review of legislative decisions, Sunstein's analysis might be compared to that of several other scholars, such as Gerald Gunther, who have advocated more searching constitutional review of legislation to determine whether the

In addition to recommending strengthened judicial review, Sunstein also applauds *structural* mechanisms that increase the independence of political representatives from the public and other representatives, thereby, at least in theory, offering them greater opportunity to exercise civic virtue. "Madisonian republicanism," according to Sunstein, "calls for substantial autonomy" of the people's representatives and "insulation" from "constituent pressures."<sup>56</sup> The most important device, in Sunstein's view, appears to be the representatives' independence from the electoral public; he argues that the existence of representative democracy was itself intended to ensure some independence, as was the original election of senators by state legislatures<sup>57</sup> and the president by the Electoral College.<sup>58</sup>

In addition to this "vertical" distance, Sunstein's approach implicitly suggests that members of Congress should enjoy some "horizontal" independence from other politicians in order to further the dialogic ideal. According to Sunstein, courts should ensure that representatives are acting in a deliberative fashion when making policy, with no deci-

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provisions of the legislation are rationally related to its goals. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-48 (1972). This earlier literature was criticized on the grounds that much legislation, when its actual goals are uncovered, is motivated by pure self-interest, to which its particular provisions are almost always tautologically related. See Linde, *supra* note 3, at 222-35; Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 175-77 (1977-78); Posner, *supra* note 3, at 29. Sunstein's approach suggests that the more searching standard of review proposed during this earlier effort was not misguided, although its proponents should have acknowledged that the goal was to expose and invalidate legislation that was rationalized only on self-interested grounds. See Sunstein, *Interest Groups*, *supra* note 18, at 69 n.177.

While the breadth of Sunstein's proposed motivational review is particularly far reaching, several other authors have offered similar proposals for invalidating legislation that was adopted merely because of the exercise of political power, suggesting the increasing attractiveness of this approach to a variety of members of the legal academic community. See Epstein, *supra* note 18, at 713-17; Griffin, *supra* note 18, at 772; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 867.

<sup>56</sup> C. Sunstein, *supra* note 18, at 30-33.

<sup>57</sup> See Sunstein, *Interest Groups*, *supra* note 18, at 43; see also U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII, § 1 (direct election of senators). The seventeenth amendment provided for popular election of United States senators in place of selection by state legislatures.

<sup>58</sup> See U.S. CONST. art. II, § 1, cls. 2-3. While this is a linchpin of civic republican philosophy, Sunstein himself does not specifically propose any further *structural* changes for increasing this independence, perhaps because it confronts so directly the democratic character of our institutions. Other authors have explored this, however. See, e.g., Elliot, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1105-06 (suggesting a possible reform to the structure of Congress, such as a twelve-year senate term without the possibility of reelection, to insulate Congress from pressures of special interest groups).

sions based on "raw power" or "pluralist compromise."<sup>59</sup> Instead, legislators must give "detailed explanations" to ensure that "participation [is] afforded" and "the relevant officials engage[] in a genuine attempt to discern the public interest."<sup>60</sup> Procedural devices that bypass political actors, such as the legislative veto, are unconstitutional, in Sunstein's eyes, because they do not afford independent political actors the opportunity to engage in deliberative democracy.<sup>61</sup> As a general matter, "[i]mpartiality within republican theories . . . requires public regarding investigations offered after multiple points of view have been consulted and (to the extent possible) genuinely understood."<sup>62</sup> Thus, "disagreement" is to be "a creative and productive force," with political actors treating one another as independent, intellectual ends.<sup>63</sup>

In his forthcoming article, Sunstein develops this philosophy further, arguing that civic virtue also supports a system of proportional representation because it serves to stimulate a rich and diverse dialogue among legislators. Under one possible approach, "all those groups that are able to attain more than a minimal share of the vote," as well as "disadvantaged groups," would be guaranteed representation so that they would have the "political power to exert influence on political outcomes."<sup>64</sup> In defense of the requirement, he explains, "The basic constitutional institutions of federalism, bicameralism, and checks and balances share some of the appeal of proportional representation, . . . [proliferating] the points of access to government, increasing the ability of diverse groups to influence policy, multiplying perspectives in government, and improving deliberative capacities."<sup>65</sup>

<sup>59</sup> Sunstein, *Interest Groups*, *supra* note 18, at 50-51.

<sup>60</sup> *Id.* at 65.

<sup>61</sup> *See id.* at 53. Scholars have already found that the legislative veto offers a strategic advantage to special interest groups, not necessarily because of its effect on legislative deliberations, but due to the effective bypassing of approval by both houses of Congress. *See* Bruff & Gelhorn, *Congressional Control of Administrative Regulation: A Study of Vetoes*, 90 HARV. L. REV. 1369, 1417-20 (1977).

<sup>62</sup> C. Sunstein, *supra* note 18, at 51-52.

<sup>63</sup> *Id.* at 53.

<sup>64</sup> *Id.* at 63-64. *But see* Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after Davis v. Bandemer*, 136 U. PA. L. REV. 183, 213 (1987) (civic virtue and proportional representation are inconsistent). Sunstein recognizes that there is some tension between the exercise of power and a more general civic virtue philosophy. *See* C. Sunstein, *supra* note 18, at 65.

<sup>65</sup> C. Sunstein, *supra* note 18, at 63. In a recent administrative law article, Sunstein offers a similar analysis on behalf of heightened presidential, legislative, and judicial oversight of administrative agency decisions. *See* Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 429, 487, 509 (1987) (simultaneous presidential, legislative, and judicial control can, "by proliferating points of access to government . . . increase the opportunity for groups to seek and obtain reform" and "bring about something close to the safeguards of the original constitutional framework"); *see also id.* at 489-90 (arguing for a dispersal of power in administration because, as in the

In his proposals for reform, then, Sunstein envisions the Constitution and the courts imposing a deliberative model on Congress, through judicial review of the discussions and interactions between legislators, protection of legislators' independence from constituents, and stimulation of greater access of different groups to legislative deliberations, all with the purpose of ensuring that representatives can and will express their view of legislation in a thoughtful manner. While the full breadth of judicial and structural changes that civic virtue proponents would support are still evolving, Sunstein, along with other authors who claim to be sympathetic to this approach, appears to be exploring ways in which the "courts [would] play a role in structuring the processes of representation to insulate representatives from pressures so that they can better deliberate in the public interest."<sup>66</sup>

In addition to motivational review, two related devices for stimulating civically virtuous legislation deserve mention. The first is the supplementation of formal and informal congressional procedures, which Sunstein does not specifically advocate but which may be implicit in his "deliberative requirement" and certainly is a time-honored technique for ensuring that "multiple points of view have been consulted and . . . genuinely understood."<sup>67</sup> While a number of academics have explored the value of procedures in stimulating a public-regarding

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case of separate branches, usually "at least one branch will be responsive to the interests of politically weak groups and thus will become an advocate for reform"). Other writers have emphasized the value of diversity as a mechanism for stimulating participation and dialogue. See, e.g., Michelman, *supra* note 49, at 32-33; Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 357, 395-405; Stewart, *supra* note 18, at 1566-76.

<sup>66</sup> Farber & Frickey, *supra* note 36, at 912 n.224 (citing Sunstein, *Interest Groups*, *supra* note 18, at 31-35). Other authors have praised or advocated increasing the insulation of representatives from their constituency. See, e.g., Bruff, *supra* note 43, at 217-18 (suggesting that representatives are able to resist monitoring by interest groups and their constituents because such monitoring is expensive); Elliot, *supra* note 58, at 1105-06 (suggesting a possible reform to the structure of Congress, such as a twelve-year senate term without the possibility of reelection, to insulate Congress from pressures of special interest groups). For scholars advancing some type of general motivational review of the legislative process, see Epstein, *supra* note 18, at 713-17; Griffin, *supra* note 18, at 772; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 867.

Along parallel lines, some states have adopted conflict of interest codes that would be applicable to legislative staffs, as well as legislators. See, e.g., MASS. GEN. LAWS ANN. ch. 268A § 6 (West 1980) (same code of ethics applicable to all state and municipal elected officials, appointed officials, and employees); R.I. GEN. LAWS § 36-14-4, -5 (Michie Supp. 1987) (same). See generally Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67, 78, 82 (1987) (proposing a model code for legislative drafters in which they should serve the "legislature," and not specific legislators).

<sup>67</sup> C. Sunstein, *supra* note 18, at 52; see also *supra* note 65 (discussing the role of dialogue).

dialogue within the administrative process,<sup>68</sup> some have focused this type of analysis on the legislative context as well.<sup>69</sup> Indeed, members of the Court have found that the Constitution may impose a type of due process of lawmaking obligation on legislation involving race.<sup>70</sup> Where applicable, this requirement may have both a procedural and a deliberative component—Congress and its committees are to consider issues through some procedures (perhaps including hearings and written reports). In subjecting legislation to this scrutiny, moreover, the congressional record would need to reflect consideration of the merits and de-

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<sup>68</sup> See, e.g., Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 886 (1981) (discussing dignitary theories of due process, where the emphasis is on the "degree to which decisional processes preserve and enhance human dignity and self-respect"); Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126, 127 (1977) (formal explanatory procedures "seem responsive to demands for revelation and participation"); Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 444 (1977) [hereinafter Tribe, *Emerging Reconnection*] ("Rules governing permissible structures of [administrative] enforcement may . . . take the form of mandatory opportunities for participation by various affected individuals."); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 301 (1975) (structural due process "envision[s] the Supreme Court as structuring a dialogue between the state and those whose liberty its laws confine, a dialogue in which the continuing legitimacy of a law turns on the current willingness and ability of the state to come forth with rational justifications for the laws' continued enforcement.").

<sup>69</sup> See, e.g., Baird, *State Empowerment after Garcia*, 18 URB. LAW. 491, 514-15 (1986); Days, Fullilove, 96 YALE L.J. 453, 469-70 (1986); Tribe, *Emerging Reconnection*, *supra* note 68, at 441-44; Comment, *The Tenth Amendment after Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1679 (1987).

<sup>70</sup> See Fullilove v. Klutznick, 448 U.S. 448, 456-67 (1980) (Burger, C.J., opinion of the court) (upholding classification since Congress extensively deliberated on the issue); *id.* at 497-502, 508-10 (Powell, J., concurring) (noting that Congress had conducted sufficient fact-finding to justify its decision to employ a race-conscious remedy); *id.* at 535-36, 548-54 (Stevens, J., dissenting) (doubting whether Congress carefully considered the legislation); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (Powell, J., opinion of the court) (describing the necessity of legislative or administrative factual findings in upholding the constitutionality of legislation favoring one group over another); *cf.* Davis v. Bandemer, 106 S. Ct. 2792, 2832-33 (1986) (Powell, J., concurring and dissenting) (suggesting that in order to determine the constitutionality of a redistricting plan, the Court should first examine the state legislative process by which the plan was passed).

A weak version of the due process of lawmaking model is the "call [for] courts to employ clear statement principles of statutory construction so as to help bring about consistency and coordination in the law." C. Sunstein, *supra* note 18, at 81; see, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required 'an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.' " " (quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984) (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979))). While a judicially enforced clear statement requirement forces Congress to make its intentions explicit, it does not necessarily guarantee that Congress considered the issue as part of a public-regarding dialogue.



merits of the proposal.<sup>71</sup>

The Court's current position, though, is obviously quite limited. It (and particularly Justice Stevens in several influential concurring opinions) appears to have imposed this type of condition only in certain special circumstances where important constitutional interests are at stake.<sup>72</sup> Nevertheless, when those interests are affected, the analysis shares some of the same goals as that of Sunstein. Indeed, some cases may portend an expansion of this requirement to a variety of other contexts as well.<sup>73</sup> More importantly, scholars who object to motivational or "deliberative" review have called for enhanced enforcement by courts of existing internal legislative procedures, on the apparent theory that increased proceduralization of legislative activities, although not necessarily adjudicative in format, will also improve legislative decisionmaking.<sup>74</sup>

A final device that courts might use to stimulate dialogue among legislative actors is statutory construction. In perhaps the fullest exploration of this issue, Jonathan Macey maintains that courts should construe statutes according to their public-regarding goals—those purposes that express "principle"—unless Congress makes clear on the face of the statute or in the legislative history that its purpose is simply to further private-regarding goals.<sup>75</sup> Under Macey's approach, courts would not strike down legislation passed to further private interests, as evidenced by its legislative history, but would interpret legislation according to the public-regarding goals that, according to Macey, are invariably offered by members of Congress as the rationale for legislation's passage.<sup>76</sup> Courts would ignore any private regarding explanation unless Congress publicly presented it as the preeminent goal of the legislation. By suggesting that courts should refuse to dig for the private-regarding purpose and instead give legislation a public-regarding construction unless Congress openly admits its goal, Macey seeks to facilitate and stimulate public awareness and oversight of special interest

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<sup>71</sup> See, e.g., *Fullilove*, 448 U.S. at 456-67; *Bakke*, 438 U.S. at 307-10.

<sup>72</sup> See *supra* note 70.

<sup>73</sup> See Farber & Frickey, *supra* note 36, at 917 n.247.

<sup>74</sup> See *id.* at 920-24; Linde, *supra* note 3, at 235-55. Farber, Frickey, and Linde all support enforcement of legislative procedures by courts, without exploring in detail what type of procedures *ought* to be adopted by legislatures, or why those they have adopted *ought* to be of some value. The implication appears to be that such procedures, like their judicial and administrative counterparts, would help stimulate deliberation and dialogue within the legislative process.

<sup>75</sup> See Macey, *supra* note 18, at 240-56.

<sup>76</sup> See *id.* at 251 ("[W]here [there is] a sharp divergence between the stated public-regarding purpose of the legislature and the true special interest motivation behind a particular statute, courts will . . . resolve any ambiguities in the statute consistently with the stated public-regarding purpose.").

legislation, and thereby reduce, in his view, the amount of legislation adopted as a result of special interest pressures.<sup>77</sup> Thus, Macey also envisions the courts as stimulating virtue within the legislature, but in a fundamentally different manner than the general civic virtue analysis—by enhancing popular accountability.<sup>78</sup>

### B. *Alternative Methods of Stimulating Public-Regarding Deliberation: Temporal Filters*

In general, then, enhanced judicial review of legislative motivation and deliberation, greater legislative insulation, proportional representation, and supplementation of legislative procedures are the main devices being explored for enhancing civic virtue. With the exception of Macey's approach to statutory construction, which, as discussed below, is more closely aligned with the political party literature,<sup>79</sup> these techniques all seek to affect legislative motivation largely by insulating government actors from electoral and popular accountability. For comparative purposes, however, it is important to contrast these approaches

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<sup>77</sup> Macey's approach should be contrasted with that of William Eskridge, who envisions the deliberative and rationalistic aspects of judicial interpretation as introducing a public-regarding element into legislation. See Eskridge, *supra* note 4, at 1529 ("The role of the courts . . . is to be further deliberative filters, as envisioned by Hamilton, mitigating the effect of unwise laws and exploring their full consequences."). Unlike Macey, Eskridge does not foresee courts facilitating democratic oversight of legislation in order to give effect to the deliberative elements within the legislative arena; rather, they should impose their own deliberative approach to statutory construction of ambiguous provisions, unless and until reversed by clear legislative enactment. See *id.* at 1542; see also C. Sunstein, *supra* note 18, at 74-83 (discussing courts introducing deliberative and rationalist elements into the construction of statutes). Thus, like Fiss, and others, Eskridge appears to locate the primary source of virtue in the judiciary. See Eskridge, *supra* note 4, at 1530 (legislative "biases may be ameliorated by treating judges as representatives charged with interpreting statutes dynamically"); Fiss, *Foreword*, *supra* note 4, at 2 ("Adjudication is the social process by which judges give meaning to our public values"); cf. Michelman, *supra* note 49, at 74 ("[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach."). Because Eskridge's constructive technique relies fundamentally on a conditional delegation of deliberative responsibility to the courts, and not on a stimulation of such activity within Congress, it is not a focus of the present analysis.

<sup>78</sup> In some respects, Macey's article may be attempting to synthesize the two ideal-typical approaches outlined in this Article, arguing that the democratic (or political party) solution is also the deliberative solution. For example, he states, "[b]y definition, the benefits from public spirited legislation fall on the public generally." Macey, *supra* note 18, at 231 n.44. As noted below, however, this is certainly not logically required nor factually true in many cases. See *infra* notes 105-09 and accompanying text. Public scrutiny does not necessarily lead to principled legislation, at least in a civic virtue sense. For this reason, Macey's approach should probably be seen as merely furthering democratic accountability and, in this sense, is more consistent with the political party approach. See *infra* note 105 and accompanying text.

<sup>79</sup> See *infra* note 105 and accompanying text.

with methods geared toward enhancing the public-regarding quality of government decisions through the imposition of a temporal veil of ignorance. These latter techniques, which rely on the prospective application and generality of rules to excise the self-interest of the framers, do not raise the same type of problems of popular accountability that are the major focus of this Article.

Historically, the most important device has been constitutional amendment. By making policy decisions through constitutional revision, government actors and the population at large contemplate issues, one hopes, through the filter of a general, largely prospective, constitutional lens.<sup>80</sup> Given a sufficient level of abstraction and temporal distance, the precise application of the constitutional language to the future circumstances of individual voters and politicians may be unclear. As a result, the actors should be less inclined to identify and act out of concern for a specific personal or group benefit, and more likely to consider the effect of the amendment on the nation as a whole.<sup>81</sup>

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<sup>80</sup> See J. BUCHANAN & G. TULLOCK, *supra* note 34, at 77-78 ("uncertainty that is required in order for the individual to be lead by his own interest to support constitutional provisions that are generally advantageous to all individuals and to all groups seems likely to be present at any constitutional stage of discussion"); Ackerman, *supra* note 18, at 1020-23 (the population is ordinarily in a period of high politics when amending the Constitution); Elliot, *supra* note 58, at 1106-07 (a constitutional convention would transcend politics as usual and frame the issues on a general and abstract level); Mueller, *Constitutional Democracy and Social Welfare*, 87 Q.J. ECON. 60, 61 (1973) (the drafters of a constitutional amendment should consider the impact on all citizens and future generations). Based on the work of Schelling, there is an expanding analogous literature on the value of an individual establishing rules to limit her future decisions. See e.g., T. SCHELLING, CHOICE AND CONSEQUENCE: PERSPECTIVES OF AN ERRANT ECONOMIST 57-112 (1984); Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357, 365-73 (1985); Schelling, *Self-Command in Practice, in Policy and in a Theory of Rational Choice*, 74-2 AM. ECON. REV. 1, 1-3 (1984). But cf. Burt, *Commentary on Schelling's "Enforcing Rules on Oneself,"* 1 J.L. ECON. & ORG. 381, 382 (1985) (critiquing Schelling's failure to recognize "free will," that is, a person's ability to "recognize past preference in the light of present knowledge and values").

<sup>81</sup> The bill of attainder clause establishes a similar requirement through separation of powers. See U.S. CONST. art. I, § 9, cl. 3. In the specific context of imposing punishments, it forces lawmakers to legislate with a sufficient level of generality that the exact application of the statute by administrative agencies or courts may not be clear. See *United States v. Brown*, 381 U.S. 437, 449-50 (1965) (in establishing criminal liability consistent with the obligations of the bill of attainder clause, Congress must "set forth a generally applicable rule . . . and leave to the courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics"). For a discussion of the separation of powers issue, see Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343-60 (1962).

More generally, the requirement of separate executive and legislative branches, and the prohibition against serving in both institutions simultaneously, see U.S. CONST., art. I, § 6, cl. 2 ("no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office"), may have a similar

To economists, constitutional revision has additional benefits, even if political actors remain self-interested and the effect of the provision is known. In their view, the greater impact of constitutional revisions on all groups leads to greater popular interest in their adoption, thereby surmounting some of the collective action problems that give concentrated interest groups greater influence than diffuse interests in everyday legislation.<sup>82</sup> The broad impact of a constitutional provision can also surmount the prisoners' dilemma inherent in some special interest legislation by leading narrow groups to support policies that restrain themselves and other interests simultaneously.<sup>83</sup>

Indeed, one can view the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as Gramm-Rudman-Hollings ("GRH"),<sup>84</sup> as establishing this type of limitation, though on a more temporally and structurally limited level. Under the terms of GRH, Congress established the size of the maximum budget deficit for each of the next five consecutive fiscal years.<sup>85</sup> If the deficit, as estimated for each of those years, did not satisfy the requisite level for a particular year, GRH required the president to reduce proportionally defense and

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influence on legislative decisionmaking by reducing legislators' ability to control and therefore predict the precise effect of their legislative acts. See J. LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE § 143 (R. Kirk introd. 1955) (1689) ("because it may be too great a temptation to human frailty, apt to grasp at power for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution to their own private advantage, and thereby come to have a distinct interest from the rest of the community").

<sup>82</sup> See R. MCCORMICK & R. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST GROUP THEORY OF GOVERNMENT 127 (1981); Macey, *supra* note 18, at 246-47; see also *supra* note 34 (discussing collective action problems in the nonconstitutional, legislative context).

<sup>83</sup> See J. BUCHANAN & G. TULLOCK, *supra* note 34, at 290-91; Macey, *supra* note 18, at 246-47; see also *supra* notes 34-36 and accompanying text (narrowly concentrated interests often exercise disproportionate influence in the political process). In effect, the prisoners' dilemma of special interest legislation can be partly alleviated if groups can simultaneously agree to limit rent-seeking.

<sup>84</sup> Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C. §§ 901-22 and other scattered sections of 2 U.S.C. (Supp. IV 1986)). The Court struck down the original act, see *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986), on the grounds that vesting authority over deficit determinations in the Comptroller General violated the appointments clause, since she is removable by Congress through joint resolution. *Id.* at 3189-91. This aspect of the Act is not at issue in this Article. For a discussion of this issue, see *Symposium: Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987). Congress recently enacted a modified version of the Act, the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (codified at 2 U.S.C.A. §§ 901-22 and other scattered sections of 2 U.S.C.A. (West Supp. 1987)), which places budget authority in the Office of Management and Budget. See *id.* § 102, 101 Stat. 755-57. The analysis in the text applies equally as well to the second Act.

<sup>85</sup> See 2 U.S.C. § 902 (Supp. IV 1986); see also 2 U.S.C. § 622 (Supp. IV 1986) (definition of deficit).

nondefense spending to meet the prescribed limit.<sup>86</sup>

Although Congress certainly could have overridden the deficit restrictions by specifically repealing GRH or adopting an implied exemption, one apparent theory behind GRH was to affect the motivation of members of Congress originally voting for the reduction and to limit the ability and legitimacy of later Congresses to breach that "social compact." Because the implementation date for GRH was several years after enactment, GRH may have permitted those who voted for the bill to act without specific knowledge of its impact on their particular constituencies. The Act thereby served to erect a modified veil of ignorance that may have affected the motivations of legislators as compared to how they would have acted in the case of traditional budget resolutions.<sup>87</sup> In this limited sense, one can view GRH as promoting civic virtue.

Nevertheless, GRH did not attempt to transform the motivation of legislators and promote civic virtue in the manner that the new civic virtue writers are exploring. While they are studying structural devices and reforms that serve to insulate political actors and decentralize legislative power,<sup>88</sup> a temporal veil of ignorance does not have these effects. Indeed, GRH has the opposite consequence. Rather than directing leg-

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<sup>86</sup> 2 U.S.C. § 901 (Supp. IV 1986), *amended* by The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 102, 101 Stat. 754-64.

<sup>87</sup> These resolutions are passed each year under the Budget Control Act in order to set forth an overall budget limit for that session of Congress only. *See* 2 U.S.C. § 632 (1982 & Supp. IV 1986); *see also infra* note 89 (explaining the annual budget process). Paul Kahn has suggested that courts should hold GRH unconstitutional because it inhibits the flexibility of future Congresses to reconsider the budget judgments made by the earlier Congress that passed Gramm-Rudman—precisely that aspect of the bill which he recognizes is its chief innovation. *See Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 187-88 (1986). While Kahn presents a novel and thought-provoking perspective, it is hard to understand how GRH differs from many other statutes that explicitly or implicitly set forth rules of construction for future legislation. Indeed, under his analysis, it is not clear why each new Congress would not be required to ratify all prior legislation, including the internal rules and committee structure of Congress, immediately upon taking office, since the existence of that legislation requires Congress to pass new legislation to return to the preexisting status quo. For a thoughtful discussion of this general issue, *see Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 425 n.215. Eule also argues that, as a matter of constitutional law, each new Congress must be able to repeal existing procedural rules through majority vote. *Id.* at 407-12. The lessons of public choice theory suggest this could raise a problem, however: it is unclear how Congress could avoid Condorcet cycling if it had to resolve decisions on the rules through majority votes without a preexisting procedural system. In effect, a prior legislature may necessarily have to "control" the future, at least to the extent of establishing a procedural system to decide on the new Congress's procedures. For a discussion of the problems of majority rule decisionmaking, *see supra* note 14 and *infra* note 163.

<sup>88</sup> *See infra* notes 168-179 and accompanying text.

islators to vote on each individual appropriation bill separately, which can afford greater influence to each group pushing for a particular item, GRH sets forth one binding vote on the size of the overall budget deficit, much like budget restrictions adopted by each Congress for that Congress under the Budget Control Act.<sup>89</sup> Like the constitutional provisions discussed above,<sup>90</sup> a single vote on overall budget levels can overcome *some* of the perverse incentives of narrow "special interest" legislation by establishing an agreement to cut all such appropriations simultaneously. Thus, GRH may have sought to induce a type of civic virtue, except without attempting to insulate political actors from pressure or to decentralize decisionmaking.<sup>91</sup>

Finally, a related constitutional technique for enhancing the public-regarding quality of government decisions has been proposed by Bruce Ackerman. Under his approach, courts would be charged with fostering public-regarding policies during periods of what he calls normal or low politics, that is, moments in which he says the population and their representatives are motivated predominately by self-interest.<sup>92</sup> In order to limit the possible perverse incentives of the public during this time, courts, in Ackerman's view, should look to the general goals and purposes that the public articulated during prior periods of what Ackerman calls "high politics," that is, those moments when the populace at large has been in a public-regarding or civically virtuous mode.<sup>93</sup> Like the new civic virtue writers, then, Ackerman views the

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<sup>89</sup> Under that Act, after the president submits his budget to Congress, and each committee of Congress with legislative jurisdiction submits its views and estimates to the House and Senate Budget Committees, Congress passes a nonbinding resolution setting forth the overall budget which will be adopted for that fiscal year. See 2 U.S.C. §§ 631-32 (1982 & Supp. IV 1986). A second *binding* budget resolution is not adopted until September, after individual appropriation bills are reported out of committee. *Id.* § 635(a); see also J. KERNOCHAN, *THE LEGISLATIVE PROCESS* 27-31 (1981) (describing the budget process); Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317, 356-57 (1987) (same); Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413, 416-17 (1977) (same).

<sup>90</sup> See *supra* notes 82-83 and accompanying text.

<sup>91</sup> See *infra* text preceding note 267.

<sup>92</sup> Ackerman, *supra* note 18, at 1030, 1049-72.

<sup>93</sup> See *id.* at 1051-56. Ackerman identifies three points that satisfy these criteria: the Revolution, the Civil War, and the New Deal. This approach draws some theoretical and historical support from the political science literature on critical elections, which are those elections when the population reaches a higher level of political participation and dialogue and fundamentally reassesses existing institutional and political norms, as well as party affiliations. See W. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 11-33 (1970) (discussing various political realignments throughout American history); J. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENTS AND REALIGNMENTS OF POLITICAL PARTIES IN THE UNITED STATES* 35 (1983) (realignment occurs when a major "issue arises that cleaves the electorate on a different line and hence divides each of the parties internally"); Camp-

role of the courts as facilitating government decisions that are made by public-regarding actors.<sup>94</sup>

There are important differences between the approaches of Ackerman and the new civic virtue analysis, however. Ackerman believes that most of the population naturally and ineluctably adopts a public-regarding perspective at various times in history, thereby affording the basis for subsequent courts to enforce those understandings during periods of low politics. Thus, while both Ackerman and Sunstein invest the greatest legitimacy in the decisions reached by government actors when infused with such ideals, Ackerman's approach avoids the necessity of constructing a legal system capable of *transforming* the public or their representatives into a higher level of political dialogue. In his view, the

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bell, *A Classification of Presidential Elections*, in ELECTIONS AND THE POLITICAL ORDER 63, 63-77 (1967) (discussing maintaining, deviating, and realigning elections); Key, *A Theory of Critical Elections*, 17 J. POL. 3, 4 (1955) (critical elections occur when "the depth and intensity of electoral involvement are high"). Some authors have previously explored the significance of the phenomenon to judicial review. Compare Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 820-43 (analyzing the Court during times of political realignment and concluding that the Court does not respond to the newly entrenched popular government) with Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293-95 (1957) (the Court, through judicial review, ultimately legitimizes the policies of the newly dominant political group after a critical election).

This literature, however, raises several potential concerns with relying on critical elections as a basis for judicial review. Samuel Huntington, for example, argues that periods of high politics may not be appropriate moments for public decisionmaking due to the supposed irrationality and passion of the general population when in that state. See S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 221-62 (1981) (expressing concern over the wisdom of political judgments expressed during periods of what he calls "credal passion," which appear to be analogous to critical elections); cf. A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 128-35 (1977) (self-interest motivation implicit in and motivated by capitalism was intended as a mechanism for avoiding the irrationality of passion). The problem of a possible "bias" to American ideological thinking and its implications for civic virtue writers is discussed *infra* note 232.

In addition, theories predicated on "high politics" might raise some difficulty if society cannot expect to experience further or at least the same type of high political moments, as some have cautioned. See W. BURNHAM, *supra*, at 175-93 (a lack of stimulus to mobilize the population can prevent critical alignments from occurring and the ability to predict this phenomenon may have ended); R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 188 (1960) (While "our history suggests that only sustained crises, striking deep into the private lives of voters everywhere, will produce stable partisan alignments[,] a comparable crisis in our time would strike so deep that there might well be nothing left of our contemporary party system."); cf. Chubb & Peterson, *Realignment and Institutionalization*, in *THE NEW DIRECTIONS IN AMERICAN POLITICS* 1, 5-6, 9 (1985) [hereinafter *NEW DIRECTIONS*] (suggesting that the effect of political realignment may have moderated, since "[p]rograms are so complex, associated interests are so entrenched, and procedural protections so extensive that the rate of change is inevitably slowed").

<sup>94</sup> See Ackerman, *supra* note 18, at 1049-72.

public does so naturally and periodically.<sup>95</sup>

In addition, Ackerman does not appear to view the decisions reached through private-regarding behavior as necessarily suspect.<sup>96</sup> Protecting or pursuing one's own interests is not necessarily illegitimate or unconstitutional. Only to the extent that such decisions *conflict* with the substantive principles espoused by the public during periods of high politics, and enforced by the court through subsequent "meta-constitutional" interpretation,<sup>97</sup> would the courts view them as illegitimate and strike them down as unconstitutional. Since Ackerman's approach does not attempt through judicial review or structural reform to *transform* the motivation of everyday political actors, it does not raise the same structural issues as the proposals put forward by the other civic virtue writers discussed above.

### C. *Technical Criticisms of Civic Virtue Reforms*

While most of the substantive discussion of the new civic virtue approach can be deferred until Parts IV, V, and VI, two technical problems with these and other similar efforts to elevate legislative motivations through judicial review should be noted.

First, the requirement that a legislative body act with a specific motivation presupposes a system for identifying which subunit of that body speaks for the body as a whole. Does an oversight committee, a floor leader, a majority coalition, a committee that controls the agenda such as the rules committee, or one chamber, speak for "Congress"? In other words, what legislative evidence can the courts rely upon as the basis for determining *the* legislature's intent and motivation?<sup>98</sup> This de-

<sup>95</sup> See *id.* at 1023-24.

<sup>96</sup> See *id.* at 1034-35 (noting the high costs to curing private-regarding behavior); *id.* at 1022 ("Normal politics must be tolerated in the name of individual liberty."); cf. Ackerman, *supra* note 33, at 739 ("Given the complexity of the human comedy, a judge is bound on a fool's errand if he imagines that the good guys and bad guys of American politics can be neatly classified according to the seriousness with which they have considered opposing points of view.").

<sup>97</sup> Since Ackerman's system of judicial review does not require a constitutional amendment consistent with article V, it raises special problems in determining the arrival and meaning of a constitutional moment. See Michelman, *supra* note 49, at 60-65 (discussing the issue). This difficulty could be especially troublesome if the nature of high political moments has changed. See *supra* note 93. For this reason, the term "meta-constitutional" interpretation best captures the Court's constructive role within the Ackerman framework.

<sup>98</sup> Obviously, a great deal of insightful paper has been consumed on the question of whether or how a court can ascertain the true motivation of legislative actors. See, e.g., Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Motivation*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); see also R. DWORKIN, *supra* note 24, at 313-27 (any realistic view of the legislative process must recognize the influence



cision rule is critical, as the teachings of public choice theory constantly warn us, since it is often impossible to determine whether any actor's purpose or statement would have been ratified by the group as a whole.<sup>99</sup> Although this difficulty is certainly not peculiar to civic virtue

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of numerous groups such as members of Congress, executive officials, and assistants who prepare the initial drafts, as well as various lobbies); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 214-15 (1980) (discussing the impossibility of determining motivation in the context of constitutional interpretation); Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, 37 (distinguishing between institutional and subjective intent in statutory construction); Eskridge, *supra* note 4, at 1533-38 (discussing the inherently discretionary role of courts in statutory construction); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 756 (1966) (detailing ambiguities in ascertaining the "existence, discoverability and relevance of legislative intent"); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 246-65 (1981) (arguing that when judges find the interpretations of statutes less than satisfactory under provisional interpretations, they should be willing to stretch their linguistic intuitions in order to "discover" more suitable purposes); Note, *Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction*, 86 YALE L.J. 317, 320-21 (1976) (examining the various interpretations and problems in establishing "segregative intent" in the area of public schooling). The original debate on this conundrum occurred between Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) and Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

<sup>99</sup> See *supra* note 14 (describing significance of agenda control in determining outcomes when there are multi-peaked preferences). Indeed, Judge Easterbrook has maintained that this fact precludes courts from resorting to legislative history in order to interpret statutes. See Easterbrook, *Statutes' Domains*, *supra* note 13, at 547. While Judge Easterbrook appears to be one of the first scholars to confront the agenda control issue in statutory construction, the conclusions he draws from this observation are troubling. No court can avoid reliance on some sources outside the text to construe a statute, if for no reason other than to consult a dictionary or other document necessary to understand the meaning and context in which the language was used. See *id.* at 533 n.2, 536; see also L. WITTGENSTEIN, *PHILOSOPHICAL EXPLANATIONS* §§ 23, 43 (G. Anscombe trans. 1953) (arguing that language has no intrinsic meaning). To further support his contention, Judge Easterbrook suggests that resort to outside sources would violate the spirit, if not the letter, of the constitutional requirements of bicameralism and presentment to the president, as set forth in *INS v. Chadha*, 462 U.S. 919, 948-59 (1983), since Congress did not vote on legislative documents or present them to the president. See Easterbrook, *Statutes' Domains*, *supra* note 13, at 549. Unfortunately, that argument would apply to dictionaries as well. More importantly, once the courts adopt a clear rule of statutory construction, outside sources implicitly become part of the bill passing through Congress, thereby avoiding this constitutional problem.

Finally, Judge Easterbrook defends his novel approach on the grounds that the Framers had a preference for private autonomy and against government action, a doctrine presumably imbedded in the Constitution. See *id.* at 549-50. Curiously, his rigid theory of statutory interpretation seems to be in tension with his approach to interpreting the Constitution, from which this principle must be broadly derived. See Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 91 (stating that "language and structure, informed by constitutional history, are the proper basis of interpretation and that, perhaps, they are all that count"). But even accepting his approach to constitutional interpretation, it is unclear why liberal statutory construction necessarily undermines private autonomy, or, conversely, narrow construction to its promotion; the effect depends on the nature of the preexisting statutory and common law protections and their development by the courts. See Sunstein, *Lochner's Legacy*, 87 COLUM. L.

writers, such theories must develop some defensible basis for selecting the sources they will look to within the legislative history to determine whether the body has acted in a principled fashion.<sup>100</sup>

Of far greater concern, however, is the problem of deception—how do the courts determine whether in fact the relevant actors in a legislature, once identified, are indeed engaging in the type of principled decisionmaking that is the heart of the civic virtue ideal. In a world of paper records, it is quite easy for legislators, like their administrative counterparts, to create a paper record that bears little relationship to what in fact is going on in the internal legislative deliberations.<sup>101</sup> For this reason, the civic virtue theorists are subject to all of the objections that Rawls' original position sought to avoid—namely, the intrusion of

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REV. 873, 874 (1987) (criticizing the earlier view that "[m]arket ordering under common law [is] a part of nature rather than a legal construct"). In his subsequent *Foreword*, Judge Easterbrook appears to have relaxed this strict approach to statutory construction. See Easterbrook, *Foreword*, *supra* note 13, at 14-18.

<sup>100</sup> See Epstein, *The Pitfalls of Interpretation*, 7 HARV. J.L. & PUB. POL'Y 101, 104 (1984) (criticizing theories of statutory construction that are based on legislative motivation owing to the complexity of groups and motivations within diverse legislative bodies); Farber & Frickey, *supra* note 36, at 908-11 (criticizing efforts to base judicial review upon the motivation of the legislative body on similar grounds).

<sup>101</sup> See Farber & Frickey, *supra* note 36, at 908-09; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 868; J. Mashaw, *supra* note 36, at 42-43; see also Linde, *supra* note 3, at 231 ("pursued into the legislative process, the hope for candor is more likely to produce hypocrisy").

Peter Schuck has made a similar observation regarding political explanations for gerrymandering, noting that it "is surely the rare plan that cannot be rationalized on the basis of a plausibly legitimate districting criterion other than mere partisan advantage." Schuck, *supra* note 13, at 1354.

The experience of the analogous hard-look doctrine in the context of judicial review of administrative action, see *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983), has had mixed success. For commentary critical of the hard-look doctrine, see R. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 357-61 (1983) (court enforcement of the Act was "part of the problem . . . because [the courts] made so little effort to investigate the consequences of their action"); Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. OF REG. 257, 272 (1987) (fear of judicial review led to reduction in safety regulatory activity by the National Highway Traffic Safety Administration); Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239, 245 (1973) (obligation to give detailed explanation does not change substantive decisions); cf. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1701-02 (1975) (while "[s]tiffened requirements of formal justice may weaken agency effectiveness by draining resources and affording opponents new litigating weapons[, judicial review can] serve as a useful, selective judicial tool to force reconsideration of questionable decisions and to direct attention to factors that may be disregarded"). For a more favorable view of the hard look doctrine, see Bruff, *supra* note 43, at 237-40 (hard-look doctrine can "force agencies to pursue the creation of public rather than private goods"); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 182 (hard-look doctrine ensures that judicial review is "a 'reasoned' exercise of discretion and not merely a response to political pressures").

self-interest into public decisionmaking.<sup>102</sup> In the absence of the veil of ignorance or a realistic judicial substitute, the civic virtue theorists raise the specter of government actors masking their true intentions behind a smoke screen of public-regarding verbiage. It simply is not possible to ensure that people *are* public-regarding merely because they defend or rationalize their actions on those grounds,<sup>103</sup> or alternatively, that legislative actors are private-regarding simply because they rationalize their actions—particularly to constituents—on those grounds.

Macey's approach is subject to the same difficulties, though the reasons are more complicated. He suggests that his proposed system of statutory construction makes it more politically costly for legislators to hide their true intentions by using public-regarding language. Under his analysis, legislators who mask their actual objectives risk having the legislation they support interpreted to pursue the public goal they enunciate and against their true private goals. By suggesting that courts force legislators to choose between using public-regarding language to rationalize their private goals and being candid about their narrow interests at the risk of losing popular support, Macey believes that the amount of legislation passed at the instigation of private-regarding actors would be reduced.<sup>104</sup> In this sense, Macey's hybrid analysis offers a link between the civic virtue and the political party approaches, suggesting that the latter leads to the former.

It is far from clear, however, whether this system is realistic, at least as a mechanism for promoting virtue.<sup>105</sup> First, it assumes a strict connection between popular control and public-regarding motivation that is neither logically nor factually supported.<sup>106</sup> The underlying assumption of most other writing on civic virtue is that virtue must be stimulated by insulation and autonomy of decisionmakers. In addition, Macey's approach is subject to the same problems of deception as other civic virtue techniques. Almost any legislative program can be *rationalized*, especially to the public, in public-regarding language ("what is good for Ford Motor Co. is good for America") without significant cost.<sup>107</sup> Indeed, the ability of legislators to mask their actions from con-

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<sup>102</sup> Rawls' heuristic device—the original position—assured that a person's knowledge of her own position in society would not intrude on her thinking on the appropriate structure of society. See *supra* notes 45-46 and accompanying text.

<sup>103</sup> See *supra* note 101 and accompanying text.

<sup>104</sup> See Macey, *supra* note 18, at 250-51.

<sup>105</sup> Instead, Macey's approach could and should be appropriately defended as an adjunct to a political party perspective.

<sup>106</sup> There is serious doubt as to the strength of this link. See *infra* notes 146-66 and accompanying text (discussing the tension between the civic virtue and political party approaches).

<sup>107</sup> See Farber & Frickey, *supra* note 36, at 910-11.

stituents in abstract, public-regarding rhetoric is viewed as one of the most serious *problems* of the legislative process.<sup>108</sup> If true, a system that enforces the publicly-stated goals of legislators might, as Judge Easterbrook has argued, have the practical effect of *extending* most private interest "deals" by giving to groups *more* than they were able to extract from legislative bargaining.<sup>109</sup> The impact of this motivational review on legislative decisionmaking would then be minuscule or perhaps even counterproductive.

These are complicated technical problems that some critics have suggested are insuperable.<sup>110</sup> Without resolving this question, it is clear that no system exists for magically transforming legislative deliberations through judicial review of legislative motivation. At a minimum, structural changes such as increased insulation, supplemented checks and balances, proportional representation, as well as perhaps other innovations, would need to be a part of any civic virtue program. The more important question, however, is whether the civic virtue writers are pursuing the best overall strategy; that is, whether the procedural and judicial reforms being explored in order to elevate the motivation of political actors are not only the best means of minimizing the influence of special interest groups and improving legislative decisionmaking, but worth the social cost.

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<sup>108</sup> See D. MAYHEW, *supra* note 35, at 132; Fiorina, *The Decline of Collective Responsibility in American Politics*, DAEDELUS, Summer 1980, at 25, 44; see also D. MAYHEW, *supra* note 35, at 73 (a member of Congress engages in three kinds of electorally oriented activities: advertising, credit-claiming, and position-taking); Nash, *A Tale of Two Legislators and How They View their Institution: Garn's Dissatisfaction Is such that He Is Getting "Really Sick,"* N.Y. Times, Dec. 21, 1987, at B10, col. 6 (senators' "primary intention is to look good, get on television and get quoted in the media" (quoting Senator Jake Garn)).

<sup>109</sup> See Easterbrook, *Foreword*, *supra* note 13, at 49; Easterbrook, *Statutes' Domains*, *supra* note 13, at 541-42. Judge Easterbrook also contends that because "balance" is an important element of public interest statutes, legislators may have intended, due to compromise, respect for private orderings, or uncertainty, that such statutes should be read narrowly. He thus cautions against the courts' unchecked enforcement of the public interest aspect of these statutes as well. See Easterbrook, *Statutes' Domain*, *supra* note 13, at 540-41. *But see* Easterbrook, *Foreword*, *supra* note 13, at 46 (recognizing that public interest statutes might be interpreted in light of their underlying purposes).

<sup>110</sup> Farber and Frickey suggest that courts cannot systematically combat the efforts of special interests by heightened scrutiny of legislation since judges are "unable to identify, in any principled fashion, individual instances in which that process has malfunctioned because of undue influence of special interests." Farber & Frickey, *supra* note 36, at 911-12, 925; see also *supra* note 98 (discussing whether and how a judge can ascertain legislative motivation). On the other hand, Farber and Frickey accept the importance of insulating legislators from pressures. See Farber & Frickey, *supra* note 36, at 912.

### III. THE TRADITIONAL POLITICAL PARTY APPROACH TO REFORM OF THE POLITICAL PROCESS

In contrast to those civic virtue scholars who have argued for increased insulation of the legislative process, other scholars pursue the "political party" approach. Rather than seeking to change the motivations of political actors, writers in this tradition have sought largely to broaden the constituencies of political representatives and have applauded those institutions, especially the Presidency and political parties, which represent a wider constituency. In other words, they have focused their attention on making those institutions more democratic, rather than attempting to make the actors within those institutions more public-regarding. By reducing the number of actors who must assent before there is agreement to any action, centralized political systems are thought to enhance majority rule, reduce collective action problems, and improve the operation of the decisional processes.

#### A. *Major Benefits of Centralized Political Institutions*

Although it would be inaccurate to suggest that the political science profession has ever adopted one particular view of the ideal political system,<sup>111</sup> an important school favors strengthening the Presidency and political parties as the best method for counteracting the influence of narrow special interest groups. This literature, which can be traced back to Professor (later President) Woodrow Wilson,<sup>112</sup> views the absence of strong parties as a serious weakness of the American political system, especially in comparison to the United Kingdom,<sup>113</sup> and inter-

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<sup>111</sup> For example, pluralism, the political theory to which most civic virtue writers see themselves as responding and providing a more attractive alternative, is probably the primary competitor of the political party approach within political science. See, e.g., C. LINDBLOM, *supra* note 38, at 327 (criticizing party rule).

<sup>112</sup> See W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1961) [hereinafter W. WILSON, *CONSTITUTIONAL GOVERNMENT*]; W. WILSON, *A CROSSROADS OF FREEDOM* (J. Davidson ed. 1956).

<sup>113</sup> One author notes that:

Wilson and others took the British parties—supposedly disciplined and cohesive, and unhampered by constitutional barriers in their governing function—as their model of responsible parties, though they disagreed concerning the extent to which British-style parties could or should be transplanted to the American setting. In general, they anticipated that the social and economic upheaval of the day not only would leave the parties with critical tasks of political integration to perform, but also would make them better equipped to do so—less parochial, more programmatic, and more nationally oriented.

D. PRICE, *BRINGING BACK THE PARTIES* 103 (1984); see also Burnham, *Party Systems and the Political Process*, in *THE AMERICAN PARTY SYSTEMS*, 277, 279 (2d ed. 1975) (American political parties lack internal cohesion and organizational capacity to per-

prets the decline of party organization and party identification as a potential crisis in the current American political process.

According to this school, strong political parties and/or a strong President promote majority rule. Specifically, political parties serve as "the special form of political organization adapted to the mobilization of majorities."<sup>114</sup> At the same time, because parties must attract diffuse majority support for controlling the Presidency and Congress, they serve to "generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally—powerful."<sup>115</sup> A similar evaluation underlies the academic writing on the Presidency. Scholars view a strong President as representing society as a whole, not narrow constituencies such as geographic or cross sectional interest groups.<sup>116</sup>

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form sustained policymaking, especially in comparison to the United Kingdom).

<sup>114</sup> E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 208 (1942) [hereinafter E. SCHATTSCHEIDER, *PARTY GOVERNMENT*]. A variety of political scientists can be placed in this school. See, e.g., W. BURNHAM, *supra* note 93, at 133 (recognizing and lamenting a trend toward politics without parties); A. RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* 10-11 (1962) (arguing that party government is a proposal for implementing majority rule); E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 75, 78-96 (1960) [hereinafter E. SCHATTSCHEIDER, *SEMI-SOVEREIGN*] ("The party system is by a wide margin the largest mobilization of people in the country. [The parties] are the only organizations that can win elections."); see also A. DOWNS, *supra* note 40, at 136-37 ("The tendency toward agreement between parties under a bipartisan system flows from the fact that party leaders must seek to build a majority of the electorate." (citation omitted)).

Much of the academic comment on the decline of parties reflects this view of the value of political parties in promoting democratic rule. See W. CROTTY, *AMERICAN PARTIES IN DECLINE* 275-79 (1984); N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 73 (1979); D. PRICE, *supra* note 113, at 105-07; Burnham, *American Politics in the 1970's: Beyond Party?*, in *THE AMERICAN PARTY SYSTEMS*, *supra* note 113, at 308, 340; Fiorina, *supra* note 108, at 28-33; Sundquist, *Whither the American Party System?*, 88 *POL. SCI. Q.* 559, 576-79 (1973).

Similarly, Justice Powell has expressed concern over Court decisions that can undermine the strength of the parties. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting) ("With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees."); *Elrod v. Burns*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting) ("Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis.").

<sup>115</sup> W. BURNHAM, *supra* note 93, at 133. Indeed, it has been suggested that "[t]he only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party . . ." Fiorina, *supra* note 108, at 26.

This view of the importance of strong political parties gained perhaps its greatest official institutional support in the 1950 report of the American Political Science Association, which called for major changes to strengthen our two party system. See COMMITTEE ON POLITICAL PARTIES, AMERICAN POLITICAL SCIENCE ASS'N, *Toward a More Responsible Two-Party System*, 44 *AM. POL. SCI. REV.* 1, 17-19 (Supp. 1950) [hereinafter AMERICAN POLITICAL SCIENCE ASS'N].

<sup>116</sup> "Generations of American political commentators have argued that the Presi-

These centralized political institutions are valuable in part because they experience fewer collective action problems.<sup>117</sup> Splintered collegial decisionmaking bodies such as the House of Representatives tend to serve narrower constituencies, because an expenditure of effort by representatives on behalf of big-ticket legislative items that have impact across a broad constituency is unrewarding politically; the benefits of working on such legislation will inure to the advantage of other representatives or their constituencies. Conversely, work by other representatives on such topics would allow inactive representatives to free ride on their efforts.<sup>118</sup> As a result, representatives have a disincentive to concern themselves with issues that affect the citizenry as a whole and a greater incentive to concern themselves with those interests that concern only their own constituents—local projects, local issues, and constituent services.<sup>119</sup>

The relative importance of these local issues to the general population, moreover, can be irrelevant to the incentives upon the representa-

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dent is the only elected official with a *direct* political interest in the stake of the entire nation." Fiorina, *The Presidency and Congress: An Electoral Connection?*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 411, 423-24 (M. Nelson 2d ed. 1988); see also G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 351-52 (1966) ("the constituency of this majestic office is all the people"); J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 451 (1981) ("in conflicts between the branches, the executive appears, usually, to reflect the *national* interest, the legislature the *local* or *special* interest"); cf. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985) (noting the greater accountability and responsiveness of the president than Congress). President Wilson also came to hold this view of the Presidency. See W. WILSON, *CONSTITUTIONAL GOVERNMENT*, *supra* note 112, at 60.

<sup>117</sup> A splintered representative body, such as the House of Representatives, is elected and voted on, like the President, by the entire citizenry, although members of the House are elected from separate districts of equal size. On this formal level, the House might appear to be as democratic as the Presidency or as a political system that has strong political parties. In particular, the House would seem to be just as likely to give effect to broad diffuse interests, which are "contained" within its constituency, as it is to give effect to narrower, more concentrated interests.

<sup>118</sup> This is a classic prisoners' dilemma problem. See *supra* note 51.

<sup>119</sup> A variety of political scientists have described the operation of this phenomenon in Congress. See L. DODD & R. SCHOTT, *supra* note 35, at 125-26; M. FIORINA, *supra* note 35, at 36-37; D. MAYHEW, *supra* note 35, at 99, 114-15; Shepsle & Weingast, *Legislative Politics and Budget Outcomes*, in *FEDERAL BUDGET POLICY IN THE 1980's* 343, 350-51 (1984). Moreover, there is considerable evidence that Congress has organized itself to facilitate this type of activity through the decentralization of power. See L. DODD & R. SCHOTT, *supra* note 35, at 106-29; M. FIORINA, *supra* note 35, at 62-67; D. MAYHEW, *supra* note 35, at 85-88. For example, House rules now require that each committee have a minimum number of subcommittees, that each bill be referred to a subcommittee, and that no member hold more than one chairmanship. See *RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* X, cls. 5-6, reprinted in *CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ONE HUNDREDTH CONGRESS, H.R. DOC. NO. 279, 99th Cong., 2d Sess.* 408-19 (1987).

tives; as a general matter, the public may care more about arms control than civil defense, but the interest in civil defense may be quite concentrated in individual districts. Thus, given the structure of Congress, there are powerful incentives for individual members of Congress to devote their time disproportionately to those of their constituents' interests about which they feel other representatives will not be concerned and for which they—and they alone—will be given credit or held accountable.

In addition to these collective action disincentives, members of Congress are concerned less often with broad public issues because of an absence of general public scrutiny. In contrast to the public stands and activities of the president, which are open to rather close review,<sup>120</sup> the activities and public positions of individual representatives are not as closely scrutinized by the press or the public at large, simply because of their numbers and the inability to hold individual members accountable for group actions in a collective body.<sup>121</sup> This creates rather powerful incentives for individual representatives to respond disproportionately to those groups that pay closest attention to what they are doing. Economic theory would explain this as a transaction or monitoring cost problem: because diffuse majoritarian interests are at a relative disadvantage in creating institutions to oversee government, they must rely disproportionately on organizations such as the press to track government actors or limit their scrutiny to the most visible and important actor—the president.<sup>122</sup>

To help alleviate these tendencies, commentators have offered strong political parties and a strong institutionalized presidency with their larger constituencies and greater visibility. A strong president or a cohesive political party that is able to control a legislative body does not experience the same level of free rider problems. Given that a greater percentage of the population falls within the group constituency, there is less of an ability to free ride on other actors, and more of an incentive, all things being equal, to work for a greater and more diffuse constituency.<sup>123</sup> Because of the high public visibility and accountability of these institutions, moreover, they may be less likely to be swayed by

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<sup>120</sup> See J. SUNDQUIST, *supra* note 116, at 30.

<sup>121</sup> See D. MAYHEW, *supra* note 35, at 115-18; Fiorina, *supra* note 108, at 26, 39-40.

<sup>122</sup> See Bruff, *supra* note 43, at 217; Macey, *supra* note 18, at 232-33.

<sup>123</sup> See AMERICAN POLITICAL SCIENCE ASS'N, *supra* note 115, at 18 (discussing how a strong party system fosters the "widest possible consent" of political goals); M. OLSON, COLLECTIVE ACTION, *supra* note 20, at 163 ("political parties usually seek collective benefits: they strive for governmental policies which . . . will help all of the people"). See generally *supra* note 51 (discussing collective action problems).



particular, narrow groups.<sup>124</sup> In short, "a strong party that is held accountable for the government of a nation-state has both the ability and the incentive to contain particularistic pressures. It controls nominations, elections, and the agenda, and it collectively realizes that small minorities are small minorities no matter how intense they are."<sup>125</sup>

Indeed, Mancur Olson has offered a related analysis of political institutions generally. In his provocative book, *The Rise and Decline of Nations*,<sup>126</sup> Olson argues that the differential in growth rates of western countries can be attributed to the relative strength of interest groups in the polity. According to his analysis, narrow interest groups, owing to their small size, inherently pursue inefficient policies because they have an incentive to ignore the costs to citizens outside the group.<sup>127</sup> Conversely, larger groups help solve the prisoners' dilemma by increasing the size of the representative group. Thus, there is a "presumption . . . that the highly encompassing organization will in its own interest seek socially efficient policies, whereas very narrow common-interest groups never have an incentive to take the interests of the larger society into account."<sup>128</sup> Under this analysis, the party structure and the traditional party identification by the electorate can presumably permit leaders of the party to surmount the narrow interests of the electorate on particular issues and more often adopt solutions that inure to the overall benefit of the society.<sup>129</sup>

### B. *Other Values of Political Parties*

In addition to affording greater representation to diffuse majority sentiments, strong parties improve the operation of the electoral decision process in other ways. First, political parties can increase the rationality of *popular* voting by giving voters a visible cue—party affilia-

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<sup>124</sup> See M. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 210-11 (1981).

<sup>125</sup> Fiorina, *supra* note 108, at 41; see also D. MAYHEW, PLACING PARTIES IN AMERICAN POLITICS 239-40 (1986) ("[a] clear, if short of perfect, relationship appears between traditional organization and 'pressure politics': the more prominent the former, the less prominent the latter"); J. SUNDQUIST, *supra* note 116, at 370 (decline of the party and rise of individualistic politics has led to influence of single-issue groups).

<sup>126</sup> M. OLSON, RISE AND DECLINE, *supra* note 20, at 75-117.

<sup>127</sup> See *id.* at 75.

<sup>128</sup> Olson, *The Political Economy of Comparative Growth Rates*, in THE POLITICAL ECONOMY OF GROWTH 7, 24 (D. Mueller ed. 1983).

<sup>129</sup> Party identification thus may avoid the prisoners' dilemma raised by each group voting only for its particular cause, to the detriment of the group and society as a whole. See *supra* note 51. In such cases party voting can offer "slack" for politicians to serve their constituents' long run interests, though not following their wishes on each particular issue.

tion—by which they can judge a candidate's connection with a broad spectrum of issues. Subsequently, political parties can ensure greater adherence of successful candidates once in office to the party platform.<sup>130</sup> For this reason, as a number of political scientists have argued, the decline of party voting has made many voting decisions by the public turn on irrelevant symbolic appeals or on incumbency.<sup>131</sup> Less educated and poorer voters are affected differentially by this development, since they tend to vote less frequently and less rationally in the absence of party cues. As a result, the decline or absence of parties has been linked to increasing political influence of better educated and wealthier voters.<sup>132</sup>

In addition to providing a voting cue for poor and less educated

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<sup>130</sup> Early writing on this connection was largely theoretical and very simplified. See A. DOWNS, *supra* note 40, at 227-34; Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 142-45 (1957). Later survey research has offered some support for the advantages of party identification as an information-economizing device. See V. KEY, *THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 1936-1960*, 52-53 (1966); Popkin, Gorman, Phillips & Smith, *What Have You Done for Me Lately? Toward an Investment Theory of Voting*, 70 AM. POL. SCI. REV. 779, 780 (1976); see also M. FIORINA, *supra* note 124, at 202 ("meaningful parties" are a prerequisite to "attributing responsibility to government decision making"); B. PAGE, *CHOICES AND ECHOES IN PRESIDENTIAL ELECTIONS 104-07* (1978) (voters who use party identification often economize on information costs); D. PRICE, *supra* note 113, at 110 ("it is often the party label that offers the best clue to candidates' positions on a range of issues, the interests they will be at pains to accommodate, the cooperative ties they will be able to establish, and the kinds of people they will be likely to bring into government"); Burnham, *The Turnout Problem*, in *ELECTIONS AMERICAN STYLE* 97, 123 (A. Reichley ed. 1987) (parties create a "collective identity, a kind of historical memory transmitted through party identification, and long-term collective commitments that permit relatively easy calculation of utilities at election time"); cf. J. WILSON, *THE AMATEUR DEMOCRAT: CLUB POLITICS IN THREE CITIES* 343 (1962) (because people are uninformed on most issues, "democracy is best served by reducing and simplifying . . . choices to a single electoral choice"). As such, party identification may provide a useful anchoring device. See R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 41-42 (1980); Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 14-18 (1982).

To some extent, the literature on the information advantages of party identification is in tension with the earlier 1950 voting studies, which viewed party identification as primarily a socialized, noninstrumental decision. See A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* 137, 146-49 (1960). The fact that, according to public choice theory, group voting is likely to have little substantive utilitarian value could be cited in support of this earlier perspective. See R. HARDIN, *supra* note 20, at 11 (noting the limitations of collective action analysis in predicting voters' behavior in some contexts).

<sup>131</sup> D. PRICE, *supra* note 113, at 110; Burnham, *supra* note 114, at 335; Fiorina, *supra* note 108, at 35-39.

<sup>132</sup> See W. BURNHAM, *The Appearance and Disappearance of the American Voter 1978*, in *THE CURRENT CRISIS IN AMERICAN POLITICS* 121, 123 (1982); W. CROTTY, *supra* note 114, at 276-77; W. HAWLEY, *NONPARTISAN ELECTIONS AND THE CASE FOR PARTY POLITICS* 22-26 (1973); D. PRICE, *supra* note 113, at 109; Burnham, *supra* note 130, at 97, 132.

voters, strong political parties assist in the running of government by helping to overcome the diffuse centers of power within Congress and between the executive and legislative branches. A strong president, backed by a strong party, may be able to secure passage and implementation of a coherent program, despite the existence of disparate centers of power.<sup>133</sup> The effectiveness of strong political parties, moreover, facilitates democratic oversight of government, as voters are able to identify and hold accountable those who are responsible for government decisionmaking.

Finally, political parties can serve as stable institutions for organizing and facilitating popular participation and consensus in government. In contrast to personality-centered political followings, parties serve as an *institutional* vehicle for facilitating long-term political activity. This may afford not only a satisfactory outlet for participants, but perhaps also may help instill a type of dedication to public service over the long run.<sup>134</sup> The necessity of forging a majority coalition can also encourage party leaders and supporters to be more open-minded toward the interests of a broad spectrum of groups whose support they may need—thereby stimulating a willingness to compromise and reach agreement.<sup>135</sup>

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<sup>133</sup> A broad spectrum of academics and politicians have found this splintering of government responsibilities to be a serious problem in the effectiveness of government and one of the most important deficiencies remedied by strong parties. See COMMITTEE ON THE CONSTITUTIONAL SYSTEM, A BICENTENNIAL ANALYSIS OF THE AMERICAN POLITICAL STRUCTURE: REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM 3-7 (1987) [hereinafter COMMITTEE ON THE CONSTITUTIONAL SYSTEM]; Fiorina, *supra* note 108, at 39-40; J. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 75-78 (1986); Cutler, *Party Government under the American Constitution*, 134 U. PA. L. REV. 25, 25-26 (1985); Sundquist, *The Crisis of Competence in Our National Government*, 95 POL. SCI. Q. 183, 190 (1980). In the now famous words of V.O. Key, "[f]or government to function, the obstructions of the constitutional mechanism must be overcome." V. KEY, POLITICS, PARTIES AND PRESSURE GROUPS 656 (1964). Similar observations have been made about the value of parties to governance on the local level. See, e.g., E. BANFIELD & J. WILSON, CITY POLITICS 126 (1963); Greenstone & Peterson, *Reformers, Machines, and the War on Poverty*, in CITY POLITICS AND PUBLIC POLICY 267, 289-92 (J. Wilson ed. 1978).

<sup>134</sup> See D. PRICE, *supra* note 113, at 113; McWilliams, *Parties as Civic Association*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 51, 64 (G. Pomper ed. 1980).

<sup>135</sup> See D. PRICE, *supra* note 113, at 26; McWilliams, *supra* note 134, at 64; see also J. WILSON, *supra* note 130, at 4 ("[p]olitics . . . consists of concrete questions and specific persons who must be dealt with in a manner that will 'keep everybody happy'"); Ackerman, *supra* note 33, at 734 n.39 (rather than alienating groups of voters, "most would-be politicians . . . make rounds of all significant social and ethnic groups in our society"). For a comparison of this process with rational dialogue attempts to achieve consensus and instill virtue, see *infra* notes 240-47 and accompanying text.

C. *Limitations of Party Rule*

Of course, strengthening the Presidency and political parties may be achieved at the expense of other values, but such goals do not appear central to the contemporary debate. The most important is the participation of insular minorities. Small groups are generally less able to find institutional representation in the halls of concentrated power,<sup>136</sup> a fact that may be troubling to those, such as Sunstein, who believe policy is strengthened by rational dialogue among a diverse group of representatives.<sup>137</sup>

The diminished influence of narrower groups, however, obviously has its positive aspects. Advocates of political parties, as well as civic virtue, ordinarily believe that narrow interest groups have too great an influence within the current political process.<sup>138</sup> This concern, therefore, does not appear to refute the central thrust of the political science thesis—the value (via a *centralization* of governmental power) of reducing the influence of special interest groups.

Advocates of strong parties and presidents can also be criticized on the ground that these institutions are less likely to protect against tyranny. This is an objection occasionally leveled against law and economics scholars in other contexts—they have assumed that market actors will protect their own self interest; or, analogously, that a strong party will protect its own constituency.<sup>139</sup> Yet by increasing the size of the constituency one does not *ensure* that the interests of everyone in the group will be served. To the contrary, the absence of alternate organizations may, by eliminating countervailing power as well as competitive

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<sup>136</sup> See *supra* notes 124-25. This is one aspect of the pluralist criticism of the strong party advocates. See, e.g., C. LINDBLOM, *supra* note 38, at 244; see also *id.* at 311-29 (outlining the pluralist response to the strong party literature).

<sup>137</sup> Several political scientists have cited this diversity and stimulation of new ideas as one possible silver lining in the cloud of dispersed power. See M. DERTHICK & P. QUIRK, *supra* note 23, at 257; A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 156-71 (1984); Huntington, *Congressional Responses to the Twentieth Century*, in *THE CONGRESS AND AMERICA'S FUTURE* 6, 31-32 (D. Truman ed. 1973); see also C. LINDBLOM, *supra* note 38, at 3-17 (describing the value of decisionmaking in a decentralized, dispersed environment). Indeed, Sunstein's proposal for proportional representation specifically seeks to stimulate such diversity as a means of facilitating rational dialogue.

<sup>138</sup> See e.g., Ackerman, *supra* note 33, at 745; Macey, *supra* note 18, at 223; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 849-51; Sunstein, *Interest Groups*, *supra* note 18, at 29.

<sup>139</sup> For a similar criticism of economics for failing to consider the value of "voice," as well as the difficulties of "exit," in holding organizations accountable, see A. HIRSCHMAN, *supra* note 29, at 1-4. Curiously, this problem—the fact that groups do not necessarily represent the interests of their members—is one of Olson's chief insights. See M. OLSON, *COLLECTIVE ACTION*, *supra* note 20, at 126-27.

alternatives, increase the ability of government leaders to ignore the interests and ideals of those in the group.<sup>140</sup> As separation of powers advocates have long cautioned, the need to protect against such tyranny may necessitate that countervailing institutions be accepted as a barrier to unreflective action.<sup>141</sup>

Here again, however, the traditional political party advocates offer a response: the two party system. The model they advocate seeks to hold power in check by a bimodal system of accountability—a president faced by an effective Congress or another party out of power; or a prime minister checked by an opposition party.<sup>142</sup> Under this view splintered government not only facilitates pursuit of various special interest programs, but *undermines* the protection against tyranny that this bimodal system affords. The greatest source of competition or check on tyranny would be another strong party, not splintered sources of independent power that could not provide sustained consistent opposition. Indeed, many legislative attempts to *centralize* power in Congress were intended to check executive tyranny.<sup>143</sup> From this perspective,

<sup>140</sup> See J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 115-57 (1958) (discussing the need for countervailing power); A. HIRSCHMAN, *supra* note 29, at 20-31 (describing the need for the exit option, that is, the option to leave one organization for another); A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 377-419 (1973) (discussing the tyranny of unchecked executive power).

<sup>141</sup> See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667-69 (1984) (describing the checks and balances function of separation of powers). See generally *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (doctrine of separation of powers adopted "not to promote efficiency but preclude the exercise of arbitrary power"); *THE FEDERALIST* No. 10, at 77 (C. Rossiter ed. 1961) (J. Madison) (advantage of well-constructed union is "its tendency to break and control the violence of faction"); *THE FEDERALIST*, *supra*, No. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny."). A simple statistical argument can also be made against concentrating powers. If power is dispersed and divided, the resulting system would, all things being equal, be less likely to be biased toward any particular extreme than a system in which a powerful leader were chosen at random from the group as a whole. See D. MAHEW, *supra* note 35, at 173. The political party advocates, however, do not envision presidents or party leaders as being selected randomly but rather as tending to converge toward the center. See A. DOWNS, *supra* note 40, at 140-41.

<sup>142</sup> See A. DOWNS, *supra* note 40, at 140-41; E. SCHATTSCHNEIDER, *PARTY GOVERNMENT*, *supra* note 114, at 60, 85, 89; Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 S. CT. REV. 1, 52; see also Cutler, *supra* note 133, at 36 (relying on the Court as a check against tyranny in a party system).

<sup>143</sup> The ineffectiveness of a splintered Congress in confronting President Nixon during the Watergate scandal is cited as the prime example of this problem. See J. SUNDQUIST, *supra* note 116, at 199. As Burnham has observed, the decline of a two party system means that policymaking "rests uneasily between the alternatives of reinforced institutional deadlock and of executive imposition of policy on the rest of the system." Burnham, *supra* note 113, at 352. For a discussion of legislative attempts to

"the mediation of opposition efforts through party mechanisms tends to reduce their idiosyncratic aspects and to increase the likelihood that opposition forces . . . will have coherent alternatives to offer and the capacity to put them into effect."<sup>144</sup>

This debate raises fundamental policy issues. For purposes of the present analysis, however, it is necessary to recognize only that avoidance of tyranny is not a justification given for civic virtue approaches either. Their concern is with the influence of self-interested actors in day-to-day legislation. To help alleviate this problem, a major group within the political science profession has offered a far different solution—strong political parties and presidency.

#### IV. THE RELATIONSHIP BETWEEN THE CIVIC VIRTUE AND THE POLITICAL PARTY PERSPECTIVES

To summarize, two different approaches have been presented for reforming the legislative process, each aimed at solving the special interest problem. Recent scholarship in the civic virtue tradition is concerned primarily with the tendency of actors within the legislative process to act out of concern for, and to further the interests of, only those groups likely to be responsible for their election, as distinguished from concern for the public interest as a whole. The representatives' devotion to furthering the interests of their supporters is not based on any normative view that their supporters are morally deserving of assistance, but rather on the ground that their supporters have, or may have, the power to remove their representatives from, or fail to return them to, office.

In contrast, rather than attempting to change representatives' motivations, the political party approach has offered solutions aimed at increasing the size of the constituencies represented by those political actors vested with decisionmaking authority. By strengthening the power of the presidency, congressional leaders, and party leaders, these scholars seek to expand the size of government institutions and their constituencies, thereby diminishing collective action problems and the

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deal with some of these problems in the budget context by a centralization of powers, see J. SUNDQUIST, *supra* note 116, at 199-237.

<sup>144</sup> D. PRICE, *supra* note 113, at 114-15. There also is some question whether in today's system of widely dispersed authority, tyranny is likely to be a serious long-term problem. See *infra* notes 206-18 and accompanying text (describing extreme decentralization of authority in current Congress); see also R. DAHL, *supra* note 39, at 133 ("If majority rule is mostly a myth, surely it cannot be tyrannical, too. For if the majority cannot rule, surely it cannot be tyrannical."); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1190-91 (noting that the inherent tendency toward pluralist politics limits the possibility of tyranny of the majority).

possibility that the consequences on persons outside a representative's coalition will be ignored. In short, while the civic virtue scholars are concerned with the self-interest of narrow special interest groups, the political party scholars are concerned more with the size of such groups.

On one level, one might view these two reform programs as complementary solutions to different aspects of the private interest problem. Infusing representatives of narrow constituencies with a concern for those who are not part of their own constituency goes part of the way toward alleviating the perverse incentives, and unwelcome results, of special interest government and collective decisionmaking. At the same time, increasing the size of a government actor's constituency may sometimes achieve a similar result—not by changing the motives of the actors, but rather by increasing the number of persons that legislative representatives, by virtue of their self-interest, may be concerned with protecting. Merging both strategies together, it could be argued, might achieve the best and most complete solution to the special interest group problem.<sup>145</sup>

At the same time, however, these approaches reflect contrasting philosophical visions on how to advance the public interest. Many writers who pursue the civic virtue approach view the common good as something to be achieved through rational dialogue—the making of public policy through reasoned application of knowledge and the exercise of judgment from a largely disinterested perspective.<sup>146</sup> Although it is often unclear to what extent and in what sense these authors believe in an objective morality,<sup>147</sup> many are less concerned with protecting the

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<sup>145</sup> Indeed, Macey might be viewed as pursuing this approach. See Macey, *supra* note 18, at 261, 267; see also *supra* notes 75-78 and accompanying text. Some techniques may serve both purposes, see *infra* text accompanying note 268-69, although the structural changes for the legislature are not likely to fall into this category.

<sup>146</sup> See Griffin, *supra* note 18, at 772-75; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 866-76; Michelman, *supra* note 18, at 506-11; Sunstein, *Interest Groups*, *supra* note 18, at 45-48; Sunstein, *Naked Preferences*, *supra* note 18, at 1693-1704; Sunstein, *Public Values*, *supra* note 18, at 129-38; C. Sunstein, *supra* note 18, at 54-68; Tribe, *supra* note 68, at 301.

<sup>147</sup> Compare C. Sunstein, *supra* note 18, at 16 (“[t]he requirement of deliberation embodies substantive constraints that in some settings lead to uniquely correct outcomes.”) with *id.* at 2-3 (“republicans [do not] believe in a unitary public good”). Compare Michelman, *supra* note 49, at 23 (“To meet modern individualistic concerns, practical reason must . . . be a process of normative justification without ultimate objectivist foundations.”) with *id.* at 24 (while “[m]y reading of the history will not show the standard version mistaken in its ascription of either the objectivism of public good or the teleology of civic virtue[,] I wish rather to suggest why the civic ideal retains its hold despite its insults to modern liberal sensibilities.”). This issue is complicated by the recent attempt to redefine “objectivism” in terms of impersonality and/or the accepted rules of “communities” and “institutions.” See, e.g., Fiss, *Objectivity*, *supra* note

democratic roots of decisionmaking than with ensuring that the views of a cross section of participants find expression in the debate, resulting in a rich and diverse dialogue.<sup>148</sup> The political scientists and political economists discussed above, on the other hand, tend to place their faith in some form of majority rule, or in institutions capable of internalizing externalities, as the best long run solution to making policy decisions.<sup>149</sup>

Needless to say, in furthering these contrasting visions, the two approaches also advance very different, often inconsistent, reform packages. In order to enhance the public-regarding motivation of the legislature, civic virtue writers, at least as exemplified by Sunstein, generally have advocated strengthening those mechanisms that insulate political representatives from the exercise of power. They explore such methods as separating representatives from electoral responsibility; supplementing checks and balances and points of access so that dialogue must be undertaken before effective action; requiring public-regarding explanations for the passage of legislation; and perhaps enhancing the procedures or dialogic interactions that must be satisfied by Congress before a piece of legislation can constitutionally become law. Some have even considered a constitutional limitation on Senate terms or a prohibition against legislators or their staff working on matters in which they have a personal interest.<sup>150</sup>

The public policy proposals advanced by those writing in the political party tradition, on the other hand, point in a different direction. In their view, the independence of representatives (especially from central party leaders) is the cause of the special interest group problem, not its solution. From this perspective, the increased ability of incumbent representatives to retain office through constituency servicing,<sup>151</sup>

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4, at 734-35. Of course, whatever "objectivism" means, there is an inherent tension in the view that it can be achieved through dialogism; for if there is some definite conception of "truth," and if the purpose of dialogue is to "find" it, then why need the dialogue continue once the truth or right has been identified? See generally Michelman, *supra* note 49, at 32-33 (discussing this tension).

<sup>148</sup> In this sense, the interests (or views) of the governed public find representation through the power of their ideas. Andrzej Rapaczynski explores analogous issues in the context of federalism, suggesting that decentralized units of government enhance the ability for organization by nontraditional groups, which ultimately may be able, through organization and the percolation of ideas, to influence federal policy. See Rapaczynski, *supra* note 65, at 382-84, 399-405.

<sup>149</sup> See *supra* notes 111-29 and accompanying text. To this extent, the two traditions draw support from different philosophies of political science—Bentham and Burke. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 168-89, 198-206.

<sup>150</sup> See, e.g., Elliot, *supra* note 58, at 1095, 1106 (recommending a twelve-year term without possibility of reelection for senators); Purdy, *supra* note 66, at 71 (proposing a model code of ethics for legislative drafters).

<sup>151</sup> A representative who undertakes constituency servicing utilizes the broad public power at her disposal to solve the discrete, individual problems faced by her constitu-



gerrymandering,<sup>152</sup> and symbolic appeals,<sup>153</sup> all obstruct the formation of a majority coalition accountable to party leaders, who are in turn accountable to the public. To further their vision, therefore, they have backed a variety of reform proposals intended to *centralize* power within Congress and political institutions. These proposals include: limiting gerrymandering of the legislature,<sup>154</sup> moving the date of elections of representatives so as to increase presidential coattails and influence,<sup>155</sup> limiting recorded roll call votes in Congress or requiring party voting on a specified number of bills,<sup>156</sup> strengthening the financing and other resources of parties generally and in Congress,<sup>157</sup> and repealing the incompatibility clause so that legislators may serve in the executive branch.<sup>158</sup>

At the same time, it is important to remember that these reform packages are both derived from academic traditions that have exper-

uents. See B. CAIN, J. FERREJOHN & M. FIORINA, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* 50-76 (1987); R. FENNO, *HOMESTYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 101-13 (1978); *infra* note 226.

<sup>152</sup> Gerrymandering, "the deliberate and arbitrary distortion of district boundaries . . . for partisan . . . political purposes," *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (Fortas, J., concurring), has been criticized by a variety of scholars as protecting incumbency. See, e.g., Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective" Representation*, 14 HARV. J. ON LEGIS. 825, 876-77 (1977); Elliott, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 483 (1970); Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & POL. 357, 378 (1984). But see Mann, *Is the House of Representatives Unresponsive to Political Change?*, in *ELECTIONS AMERICAN STYLE*, *supra* note 128, at 261, 271-80 (questioning impact of gerrymandering, though recognizing that it has some effect); Schuck, *supra* note 13, at 1351-53 (discounting political benefit of gerrymandering); but cf. Lowenstein & Steinberg, *supra* note 33, at 46-47 (questioning the normative validity of attacks on the incumbency-protecting feature of gerrymandering given the reality of legislative seniority systems).

<sup>153</sup> A symbolic appeal is a plea intended not so much to achieve a goal instrumentally as to locate its advocates on the political or moral map. See D. MAYHEW, *supra* note 35, at 132-36.

<sup>154</sup> See, e.g., Adams, *supra* note 152, at 876-77; Elliott, *supra* note 152, at 490; Weinstein, *supra* note 152, at 379-80.

<sup>155</sup> See J. SUNDQUIST, *supra* note 133, at 93-98; Cutler, *supra* note 133, at 38.

<sup>156</sup> See D. MAYHEW, *supra* note 35, at 65-67, 179-80; Cutler, *supra* note 133, at 39; Sundquist, *Strengthening the National Parties*, in *ELECTIONS AMERICAN STYLE*, *supra* note 130, at 217.

<sup>157</sup> See COMMITTEE ON THE CONSTITUTIONAL SYSTEM, *supra* note 133, at 9; D. PRICE, *supra* note 113, at 242-60; J. SUNDQUIST, *CONSTITUTIONAL REFORM*, *supra* note 133, at 201; Orren, *The Changing Style of American Party Politics*, in *THE FUTURE OF AMERICAN POLITICAL PARTIES* 4 (J. Fleishman ed. 1982).

<sup>158</sup> COMMITTEE ON THE CONSTITUTIONAL SYSTEM, *supra* note 133, at 11; J. SUNDQUIST, *supra* note 133, at 167-77; Cutler, *supra* note 133, at 40-41. The incompatibility clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST., art. I, § 6, cl. 2.

iened serious intellectual ferment and criticism. Advocates of civic virtue and rational dialogue, of course, usually draw support from Rawls, whose heuristic device, the original position, envisions a disinterested public regarding individuals deliberating on the structure of the just society.<sup>159</sup> This device has been critiqued, however, on the grounds that it provides insufficient information for rational or ethical decisionmaking<sup>160</sup> and that it incorporates an incomplete vision of a human being.<sup>161</sup> While real legislators charged with engaging in rational dialogue presumably would not be subject to these particular concerns, it is unclear why their deliberations—affected deeply by their social background in the absence of a veil that was intended to filter out such biases—would necessarily lead to an agreement on a particular method for achieving the public good.<sup>162</sup>

From the opposite perspective, political scientists' presumptive faith in majority or democratic rule as the preferred system for pursuing the public interest can be fundamentally challenged. According to Arrow's impossibility theorem, in many circumstances no true majority preference exists, or, as the economists would describe it, no stable majority rule outcome exists.<sup>163</sup>

<sup>159</sup> See *supra* notes 44-46 and accompanying text.

<sup>160</sup> See R. NOZICK, *ANARCHY, STATE AND UTOPIA* 228 (1974) (criticizing the implicit assumption of the original position that the "distribution of material abilities is viewed as a 'collective asset'"); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959 (1983) ("exclusion [of information from the veil] leads to irrational choice"); Nagel, *Rawls on Justice*, in *READING RAWLS* 8-10 (N. Daniels 1975) (arguing that principles of justice cannot be derived without a prior conception of the good).

<sup>161</sup> See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 55-65, 78-80, 93-94, 147-54 (1982).

<sup>162</sup> Feminists and critical legal studies writers have criticized liberalism and dialogue on similar grounds—namely, that it is biased by the participants' social background. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED* 40-45 (1987). Sunstein, however, may consider this diversity of perspectives as an advantage. See C. Sunstein, *supra* note 18, at 22-24, 63-67. The attempt to view norms as objective within a particular interpretive community constitutes one attempt to respond to some of these problems. See *supra* note 147 and accompanying text.

<sup>163</sup> See *supra* note 14 (discussing Arrow's impossibility theorem). For expositions of these ideas, and the circumstances in which the preferences of the electorate and/or their representatives are multi peaked, see A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 178-94 (1980); D. MUELLER, *PUBLIC CHOICE* 38-49 (1979); P. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 56-65 (1986); A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 41-46 (1970). See also W. RIKER, *LIBERALISM AGAINST POPULISM* 137 (1982) (in a society that believes in decentralization of power, any system of voting may be manipulated to the advantage of the manipulator). For an analysis of these problems for judicial decisionmaking, see Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-31 (1982) (application of Arrow's theorem illustrates how the Court renders inconsistent decisions). But see Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-15 (1986) (criticizing the application of Arrow's theorem to judicial deliberations because

Public choice experts have also criticized majority rule by detailing some of the perverse incentives it creates when legislators can logroll.<sup>164</sup> The result of such a system is an inefficient production of public resources from a Pareto optimal perspective, especially as compared to a unitary, centralized ("dictatorial") framework.<sup>165</sup> While these scholars believe that majority rule is preferable to a government of dispersed powers, they certainly do not suggest that majority rule represents anything more than a second best solution to public policy, even under their own models.<sup>166</sup>

Fortunately, to evaluate the civic virtue approach, these fundamental problems need not be resolved. The advantages of a public-regarding deliberative debate are certainly not "proved" in the legal literature. If pressed, civic virtue writers presumably would not claim that such discussions in a politically and socially diverse society are likely to lead to particular, determinant results. Indeed, if this were true, they presumably would rely on the courts, the quintessentially deliberative and rationalist institution, rather than on a legislative body, to formulate policy.<sup>167</sup> Rather, the civic virtue thesis appears to be that, all things being equal, efforts to enhance the public-regarding and deliberative component of political actors' motivation will improve the overall quality of legislative deliberations and judgments and limit the perverse influence of special interest groups.

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judges are expressing a judgment, not a preference).

There have been recent attempts to demonstrate that cycling may not be as common as originally thought. See J. Mashaw, *supra* note 36, at 55. Most importantly, various legislative institutions minimize the possibility of cycling problems through agenda control and other devices. See Shepsle & Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49, 68-71 (1984); Shepsle & Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 208 (1984); Shepsle & Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 511-14 (1981).

<sup>164</sup> "Logrolling" is a term for mutual political assistance or vote-trading between legislators. See W. SAFIRE, SAFIRE'S POLITICAL DICTIONARY 384-85 (1978).

<sup>165</sup> See J. BUCHANAN & G. TULLOCK, *supra* note 34, at 131-45, 164.

<sup>166</sup> See R. INMAN, FEDERAL ASSISTANCE AND LOCAL SERVICES IN THE UNITED STATES: THE EVOLUTION OF A NEW FEDERALIST FISCAL ORDER 17-21 (National Bureau of Economics Research Working Paper No. 2283, 1987) (discussing the effects of unitary, majority rule, and dispersed power systems on federal grant programs); Inman, *Markets, Governments and the "New" Political Economy*, in 2 HANDBOOK OF PUBLIC ECONOMICS 647, 692-739 (1987) (reviewing public choice literature on dictatorial versus democratic rule).

<sup>167</sup> See Michelman, *supra* note 49, at 73-77.

## V. THE EFFECT OF CIVIC VIRTUE REFORMS ON THE INFLUENCE OF PRIVATE INTEREST GROUPS

### A. *Civic Virtue and Dispersal of Authority*

In assessing the full policy implications of the civic virtue proposals, it is important to recognize at the outset that they would probably lead to a dispersal of authority within Congress, and perhaps in government generally.<sup>168</sup> There are several reasons for this effect, which is not specifically addressed by Sunstein or others but must be recognized when weighing the practical costs of virtue.

First, as a theoretical matter, the goal of civic virtue reforms is to stimulate dialogue among political actors, where colleagues' views are consulted and, where appropriate, adopted. A true rational dialogue (as articulated in a variety of contexts) presumes a system of formal equals, with each representative capable, at least as an aspirational ideal, of having her position accepted.<sup>169</sup> Since formal equality often translates into substantial equality of power, with political actors treated as independent ends, not means, the pursuit of rational dialogue should inherently enhance the dispersion of power.<sup>170</sup> Strict obedience to party or presidential directives is, if not inconsistent with this philosophy, certainly in tension with its goals.

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<sup>168</sup> Since the full package of reforms is still being developed and debated, any conclusion must be tentative. Given the limited nature of existing proposals and of existing constitutional doctrine, however, the clear presumption must be that any changes would be incremental. Facilitating reasoned dialogue, increasing insulation from popular accountability, and supplementing legislative procedures will not transform a political institution such as Congress into a court. Barring a constitutional amendment merging articles I and III, only the relative insulation of legislators would be increased.

<sup>169</sup> See B. ACKERMAN, *supra* note 24, at 4 (in "Neutral" dialogue, "[w]henver anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is"); Fiss, *Foreword*, *supra* note 4, at 13 (in judicial dialogue, judges are obligated to listen and respond); Mashaw, *supra* note 68, at 899-901 (protections for equal respect and equal voice are essential to "dignitary approaches to due process"); Michelman, *supra* note 49, at 33 ("The dialogic themes express the vision of social normative choice as participatory, exploratory, and persuasive, rather than specialized, deductive, or demonstrative."); C. Sunstein, *supra* note 18, at 51-52 ("impartiality requires public regarding justifications offered after multiple points of view have been consulted and (to the extent possible) understood").

<sup>170</sup> Some political scientists believe that ideological politics can be inherently divisive and that it has contributed to the decline of party cohesion. See J. WILSON, *supra* note 130, at 358; Wildavsky, *The Goldwater Phenomenon: Purists, Politicians, and the Two Party-System*, in A. WILDAVSKY, *THE REVOLT AGAINST THE MASSES*, 246, 253-54 (1971). While this thesis should not be overstated, since divisions themselves create ideological debate, there is evidence of a relationship between an increasing ideological orientation to politics in Congress and decentralization of power. See *infra* notes 206-18 and accompanying text.

Second, any attempt to ensure that legislators are "autonomous" and "insulated" from political pressure, while focusing primarily on constituent or lobbyist pressures, is likely to have a direct impact on the ability of a president or central party leader to secure the support of legislators for national programs. Legislators who are truly "autonomous" and "insulated" are quite independent of presidential or party influence. Neither the president nor the party is able to secure support by warning recalcitrant representatives that leaders will campaign against their reelection.<sup>171</sup> At the same time, to the extent that legislators recognize that they will not be held accountable by their constituents for presidential or party success, they are less likely to offer assistance to party programs.<sup>172</sup>

Third, proportional representation, which Sunstein proposes,<sup>173</sup> has the specific goal of increasing the division of power among representatives within Congress and giving to each group a "piece of the action." To the degree that each group in society with visible representation is assured a significant presence in Congress, depriving the party in power of both the "victory bonus"<sup>174</sup> and the "balloon effect,"<sup>175</sup> there is likely to be a dispersal of influence among representatives.<sup>176</sup>

Fourth, discouraging the use of particularistic incentives, such as campaign funds or patronage, removes an important method by which a centralized power, such as party leaders or a president, can extend its influence. Historically, the president or party leaders have been able to secure acquiescence in programs through pork barrel politics—spreading funding among districts—or patronage appointments.<sup>177</sup> Civic vir-

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<sup>171</sup> See *infra* notes 209-13 and accompanying text.

<sup>172</sup> See M. FIORINA, *supra* note 124, at 209 ("With the separation of the presidential and congressional electoral arena, voters no longer provide strong electoral incentives for Congressmen to follow a president or their party, or, if 'follow' is too strong a suggestion for those times, incentives for Congressmen to help a president or their party succeed.")

<sup>173</sup> C. Sunstein, *supra* note 18, at 63-64.

<sup>174</sup> A "victory bonus" is the advantages that accrue to the majority party in a representative body—advantages that may be denied or weakened when factions undermine majority power. See Schuck, *supra* note 13, at 1359 (bonuses include patronage, financial rewards, organizational authority, and voting power).

<sup>175</sup> "Given the usual distribution of partisans among geographic districts, single-member/plurality-vote districting produces a balloon effect that provides the majority with more legislative seats, and the minority with fewer, than their shares of the total vote alone would imply." *Id.*

<sup>176</sup> Such a dispersal of power has been criticized for "paralyzing [the legislature by] placing the entire burden of coalition-formation on the legislature itself, rather than encouraging the formation of initial coalitions in the electoral process." Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970s 57, 71 (N. Polsby ed. 1971). But see Note, *supra* note 33, at 184 (arguing that Bickel's critique is a political judgment and not supported by empirical evidence).

<sup>177</sup> While old style political parties used cruder devices such as bribery and pa-

tue theory implicitly relies on reasoned dialogue as a substitute for such traditional means of securing support.

Finally, increased proceduralization of Congress—which may be a direct objective of civic virtue theory or merely a means for stimulating a dialogue in which “multiple points of view have been consulted”—can also lead to dispersion. Unlike a court or administrative agency, Congress ordinarily cannot act as a truly deliberative and fact-gathering body without delegation of such responsibility to subunits—in this case, committees, subcommittees, and their staffs.<sup>178</sup> As a result, if Congress seeks to provide visible demonstration of its commitment to dialogue and consultation, delegation of some authority to committees would appear to be a likely result, necessarily devolving power to the members of the committees.<sup>179</sup>

Given this dispersion, the civic virtue approach may affect the influence of private interest group behavior in two ways: first, although not an object of any civic virtue program, dispersion may disadvantage such groups simply by reducing the overall amount of legislation; or second, it may imbue legislators with sufficient virtue so as to transform fundamentally their mode of decisionmaking. For reasons discussed below, neither result seems likely.

tronage to ensure party loyalty, *see, e.g.*, E. BANFIELD, *POLITICAL INFLUENCE* 237, 240-44, 256-57 (1961) (discussing the role of patronage in Chicago politics), even modern political party advocates propose that party leaders be equipped with campaign funds and other particularistic devices to ensure accountability. *See* D. PRICE, *supra* note 113, at 251, 254-60; J. SUNDKVIST, *supra* note 133, at 201.

<sup>178</sup> The congressional workload is simply too great. *See* H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 122 (2d ed. 1981) (committees are needed to handle the large number of bills and to discuss and determine the fate of amendments); A. MAASS, *supra* note 23, at 39-40 (committees are essential for congressional oversight, the initiation of legislation, and the guidance of representatives); R. RIPLEY, *CONGRESSIONAL PROCESS AND POLICY* 7 (2d ed. 1978) (with the increased legislative workload, congressional committees and staff needed to assume greater responsibility); Davidson, *Subcommittee Government: New Channels for Policymaking*, in *THE NEW CONGRESS* 99, 99 (1981) (“legislative assemblies that not merely ratify laws but draft them must rely on specialized subgroups to attend to legislative details”).

<sup>179</sup> In his writing on administrative law, especially rulemaking, Sunstein has spoken favorably of some *centralization* of authority in the president and the Office of Management and Budget. *See* Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 189-92 (1986); Sunstein, *supra* note 65, at 453-56. According to Sunstein, presidential oversight “diminish[es] the risk of factional politics, . . . promote[s] decisions that tend to accord with the will of the public,” and permits coordination of different regulatory programs, *see* Sunstein, *supra* note 65, at 460—all values which are consistent with the political party perspective. Sunstein does not, however, defend these proposals on civic virtue grounds or discuss their possible inconsistency with civic virtue theory. Thus, the central point remains unaltered: application of a civic virtue philosophy in the legislative arena should lead to a dispersion of responsibility.

*B. Dispersion of Power as a Mechanism  
For Reducing the Amount of Legislation*

Needless to say, civic virtue writers do not usually advance the first argument, but it is a popular notion and deserves separate treatment. Apart from any change in motivation of government actors, dispersion of authority tends to disadvantage legislation pursued by narrow interest groups merely because it reduces the overall amount of legislation. In economists' language, it increases the decision costs. Under this familiar perspective, which the Framers offered as one rationale for checks and balances between the branches of government,<sup>180</sup> the greater the number of independent sources of power, the more difficult it is for any one group to gain *control* of all the requisite centers to secure legislation. Because legislation becomes generally more difficult to enact, the amount of "regressive" laws is also reduced.

This analysis, however, obviously does not explain how dispersion of power will improve the quality of the legislation actually enacted. More importantly, increasing independent sources of power should, under this theory, also reduce the overall amount of legislation, *including* legislation with diffuse support. Thus, it appears to throw the baby out with the bath water.<sup>181</sup>

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<sup>180</sup> See THE FEDERALIST, *supra* note 141, No. 10, at 82-84; see also Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 450-52 (1987) (noting the need for rival power centers); Strauss, *supra* note 141, at 578, 602-04 (checks and balances intended to promote effective government against "transitory majorities" or a dominant branch).

As a method for preserving the status quo, this system has its defenders in the separation of powers context. See Easterbrook, *Statutes' Domains*, *supra* note 13, at 549-50. As Hamilton stated:

It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

THE FEDERALIST, *supra* note 141, No. 73, at 443-44 (A. Hamilton). This perspective reflects an implicit preference for common law distributions of entitlements to legislatively adopted systems. See Sunstein, *supra* note 99, at 902-04.

<sup>181</sup> For discussions on the effect of congressional decentralization on reducing legislation, see L. RIESELBACH, CONGRESSIONAL REFORM 21-23 (1986); Cutler, *supra* note 133, at 28-29; Huntington, *supra* note 137, at 6, 27; cf. R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 50-53 (1982) (decentralization results in increased obstacles

In response, it might be suggested that the diffuse nature of support for legislation affords its advocates an advantage in a government of dispersed powers. Under this view, actors who represent independent sources of influence are more likely to reach agreement based on shared diffuse values than on narrow private interest values, which are less likely to be held by other representatives.<sup>182</sup>

This argument, however, establishes only that legislation with broad public support is more likely to be successful in a democratic polity than narrow private interest legislation because the system is based on majority rule. It does not follow that increasing the power of different independent groups within legislative bodies such as the House and Senate will favor legislation with diffuse support. To the contrary, logrolling in a system of multiple decisionmakers would appear to have the opposite effect,<sup>183</sup> especially when one weighs the advantages a dispersed system affords narrow groups to secure electoral representation and potential veto power.<sup>184</sup>

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to achieving policy goals and causes representatives to lose control of the policy agenda).

<sup>182</sup> See Hazard, *supra* note 36, at 699-700 (in a dispersed legislative system, both majority and minority must fashion their programs in broadly acceptable terms of common interest and appeal); cf. S. KELMAN, *supra* note 23, at 213 (according to Madisonianism, in a system of dispersed powers, "[p]olicies can . . . be adopted only when there is wide agreement among [political] actors—and hence when the interests of the community as a whole are being served."). For a law and economics articulation of a similar argument in the separation of powers context, see Bruff, *supra* note 43, at 218-20 (noting the Framers' awareness of the increased decision costs associated with checks and balances); Macey, *supra* note 18, at 247 (suggesting that the Framers intended to make special interest legislation expensive by increasing decision costs); *infra* note 184 (discussing the work of Buchanan and Tullock).

<sup>183</sup> See *supra* notes 164-66 and accompanying text.

<sup>184</sup> Buchanan and Tullock's theoretical observation that two differently constituted legislative bodies (such as the Senate and House) may be less likely together to give effect to narrow special interests than only one of those bodies acting alone, see J. BUCHANAN & G. TULLOCK, *supra* note 34, at 247-48, is not to the contrary. Most importantly, Buchanan and Tullock do not compare directly the benefits of a two-chamber, dispersed system to a single-leader system, which is most directly analogous to an ideal-typical two party system. As noted above, dispersion of authority in a particular chamber increases the opportunity for narrow groups to secure a foothold in government and trade their influence (or perhaps veto) for legislative impact. See *supra* notes 173-76 and accompanying text. A political party system consolidates power in dispersed institutions, making it analogous to a single-leader structure and more difficult for narrow groups to secure initial representation. See *infra* notes 214-15 and accompanying text (discussing the increased influence of special interest groups in a dispersed legislative framework).

This scenario, however, does raise a factual question, not directly implicated by the thesis of this Article, as to whether adding another dispersed chamber to a political system will in fact reduce the overall amount of special interest legislation, as Buchanan and Tullock predict. While the new procedural obstacle increases the likely number of groups whose support must be obtained to pass legislation, it also increases the number of groups with representative influence and potential veto power within government. Given the collective action difficulties that diffuse groups ordinarily face in



### C. *Dispersion of Power as a Mechanism For Inducing Civic Virtue*

#### 1. The Civic Virtue Analysis

Civic virtue theory, however, envisions insulation of authority as serving a separate, qualitatively different function: elevating the motivation of government actors. Independent political actors who are relatively insulated from the constraints of coercive political power<sup>185</sup> are supposed to make decisions on the basis of principle. In addition, as Sunstein suggests, "multiplying the points of access to government" should ensure a diversity of actors who must reach a rough agreement before undertaking joint action. Thus, independent sources of decision-making are not intended to lead participants to counter pressure and ultimately compromise,<sup>186</sup> or even to face increased decision costs per se, but rather to undertake rational debate in pursuit of the common good.<sup>187</sup>

Although the theory behind this essentially factual prediction is not explored in detail, this procedure may have some influence on motivation and dialogue. Greater independence and greater insulation of government actors from the effects of outside "pressures" does afford increased opportunity for legislators to exercise civic virtue and cooperative behavior. As discussed above, a representative and dispersed sys-

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this dispersed environment, and the incentives for legislators to pay attention to concentrated interests, the ultimate political consequence is not apparent.

<sup>185</sup> See *supra* notes 56-63 and accompanying text.

<sup>186</sup> Pressure and compromise constitute the central (though often criticized) pluralist thesis that government actors, through a system of "partisan mutual adjustment," achieve an optimal mix of legislation. See C. LINDBLOM, *supra* note 38, at 117-22 (discussing the mutual roles of political party leaders and interest group leaders in the system of mutual adjustment). For a discussion of the criticisms of pluralism, see *supra* notes 30-43 and accompanying text.

<sup>187</sup> As Hamilton stated:

The oftener [a law] is brought under examination [and] the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.

THE FEDERALIST, *supra* note 141, No. 73, at 443. Hamilton continued: "It is far less probable that culpable views of any kind should infect all the parts of government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them." *Id.*; see also THE FEDERALIST, *supra* note 141, No. 51, at 322 (J. Madison) (describing the "policy of supplying, by opposite and rival interests, the defect of better motives"); Rapaczynski, *supra* note 65, at 357 ("The very legitimation of political authority in the United States seems to rest on a theory that views unfavorably the location of sovereignty in any well-defined institution, preferring instead a dispersion of power and authority as a mode of increasing political accountability.").

tem of government offers some independence to legislators to the extent that the public is not aware of or does not care about everything they are doing.<sup>188</sup> Although legislators are obviously not independent in the same sense or to the same extent as Article III judges, their greater freedom from direct constituent control, criticized by economists as a principal agency *problem*,<sup>189</sup> can facilitate the exercise of legislative virtue.<sup>190</sup> In addition, the inability to pin responsibility on a particular politician for government action because of the multiple actors in government<sup>191</sup>—the classic collective action problem—serves also as a mechanism for facilitating independence, thereby increasing the opportunity for the exercise of virtue, as well as rational dialogue.<sup>192</sup>

The small size of our representative bodies, moreover, may facilitate more virtuous (or at least cooperative) behavior than if the population at large were making judgments. To the civic virtue proponent, smaller decisional bodies can allow for the inculcation of an elite ethos in those performing public service.<sup>193</sup> To the public choice theorist,

<sup>188</sup> See *supra* notes 120-22 and accompanying text; cf. Sunstein, *Interest Groups*, *supra* note 18, at 79, 81-83 (comparing pluralist representation with republican representation).

<sup>189</sup> See Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976) (in general agency relations, if both principal and agent are utility maximizers, some divergence from the principal's interest is inevitable); see also Macey, *supra* note 18, at 244-45 (likening a representative democracy to an agency relationship).

<sup>190</sup> See Sunstein, *Interest Groups*, *supra* note 18, at 69-72 (proposing that courts employ strengthened rationality review to "ensure that representatives have exercised some form of judgment instead of responding mechanically to interest-group pressures"); see also Farber & Frickey, *supra* note 36, at 912 n.224 (agreeing that representatives should be more insulated from pressure).

<sup>191</sup> See, e.g., Cutler, *supra* note 133, at 29; Schuck, *supra* note 13, at 1361.

<sup>192</sup> See G. PARKER, *HOMEWARD BOUND: EXPLAINING CHANGES IN CONGRESSIONAL BEHAVIOR* 12 (1986) ("Since it is impossible for constituents to keep tabs on their legislators, especially when [the legislators] are in Washington, they are largely uninformed about the behavior of their Congressmen and Senators[:] [t]his 'invisibility' can be exploited by incumbents to pursue personal goals without worrying about the reactions of constituents."). For some historical evidence of this effect engendered by prior efforts to decentralize Congress, see *infra* notes 209-13 and accompanying text.

<sup>193</sup> The original model of a civically virtuous community was the town meeting. See J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 39-138 (1980); Sunstein, *Interest Groups*, *supra* note 18, at 31; C. Sunstein, *supra* note 18, at 25-26; cf. J. ROUSSEAU, *THE SOCIAL CONTRACT* 68-72 (R. Harrington trans. 1893) (civic republicanism seeks to minimize the size of society to enhance the opportunities for the inculcation of virtue). Under this view, small units of decisionmaking offer the best opportunity for "deliberation and debate," which would "inculcate civic virtue." G. STONE, L. SEIDMEN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 6 (1986) [hereinafter G. STONE, *CONSTITUTIONAL LAW*]. Unlike the prototypical town meeting, however, Congress lacks the "spiritual and material homogeneity . . . required to support and reward unselfish devotion to the common good," Michelman, *supra* note 49, at 19, which is one of the reasons that the antifederalists opposed the formation of a strong federal union. See Sunstein, *Interest Groups*, *supra* note 18, at 36.

smaller bodies facilitate cooperative behavior owing to participants' greater ability to reach agreement with, and monitor the behavior of, self-interested opponents and allies within a small group setting.<sup>194</sup> Thus, both perspectives suggest enhanced opportunities for public-regarding and/or cooperative behavior can be found within smaller insulated groups like Congress and its committees.<sup>195</sup>

## 2. Limits of the Civic Virtue Perspective

It is unlikely, however, that these methods to increase the insulation of members and dispersion of responsibility in Congress will induce civic virtue, or to the extent they do, that it will be worth the loss in quality of political decisionmaking, given the state of existing institutions.

### a. *Impact on Motivation*

To begin with, barring a transformation of Congress into an article III court, self-interested legislative behavior is likely to remain, for several reasons. First, in the context of our constitutional structure, all legislators will eventually be subject to popular accountability through election. Even if legislators are not open to direct "pressure" through lobbying or campaign contributions, they always must and will be sensitive to how their actions will appear to voters at reelection or possible elevation to a higher office.<sup>196</sup>

Second, increasing the insulation of representatives—through expanded procedures or loosened electoral accountability—may increase their independence (or "slack") in some aggregate sense but also may

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<sup>194</sup> By decreasing the size of the decisional group from the general public to Congress, the possibility of mutually cooperative behavior through continuing interaction is ordinarily enhanced among participants. See R. AXELROD, *supra* note 22, at 16. Technically, this is not the result of civic virtue, but the ability to constrain self-interest through bargaining and monitoring. Under this reasoning, however, decreasing the size of the decisional group further—to two strong parties or a strong president—should be even more successful. Moreover, a dispersed Congress creates agency and monitoring problems by the public of group behavior, see *infra* notes 198-99 and accompanying text, which may increase the advantages of a strong presidency or two party system over a legislative system.

<sup>195</sup> Scholars have begun to explore the complicated relationship of group size and other characteristics to cooperative behavior in a dispersed group. See, e.g., R. HARDIN, *supra* note 20, at 38-49; Hoffman & Spitzer, *Experimental Test of the Coase Theorem with Large Bargaining Groups*, 15 J. LEGAL STUD. 149, 151 (1986).

<sup>196</sup> Much, if not most, popular voting is retrospective in this sense. See M. FIORINA, *supra* note 124, at 7 ("The patterns of flow of the major streams of shifting voters graphically reflect the electorate in its great, and perhaps principal role as an appraiser of past events, past performance, and past actions." (quoting V. KEY, *supra* note 130, at 61)).

improve the *relative* ability of special interest groups to affect their decisions. As discussed above, one of the principal advantages of concentrated special interest groups is their greater monitoring capabilities, especially over complex institutions such as Congress.<sup>197</sup> Focusing on the mechanics of passage requires both experience and resources. If the courts move to increase Congress's insulation and political complexity through expanded procedural requirements, effective dispersion of power, proportional representation, and enhanced legislative independence, the possibility exists that the comparative influence of special interest groups, paradoxically, would be enhanced.<sup>198</sup> Indeed, some have argued that the increased complexity in government decisionmaking associated with the decline of political parties over the last three decades has also *decreased* popular understanding of and interest in politics, thereby reducing voter turnout, especially among poorer and less educated voters.<sup>199</sup> As a result, popular electoral accountability may diminish in a system of dispersed power, further enhancing the relative influence of organized and concentrated special interest groups.

Third, greater insulation from electoral or public pressure may serve to substitute one type of private-regarding behavior for another. While insulation may reduce popular pressures, it may also increase the opportunity for politicians to pursue their own private agendas.<sup>200</sup> The assumption of the insulation strategy is that the public is more likely to be private-regarding than politicians. Yet, individual politicians' behavior often can have more direct influence on their personal interests (that is, their careers) than *individual* citizens' political behavior, especially voting, since voters' effort is unlikely to have any narrowly instrumental advantage for their own personal welfare.<sup>201</sup> Politi-

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<sup>197</sup> See *supra* notes 120-22 and accompanying text.

<sup>198</sup> Indeed, one school of political science scholarship views the influence of special interest groups as primarily an elite phenomenon, in which power is exercised through control over information, career advancement, and financial resources. See K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 7-9, 148-69 (1986) (special interest groups offer an impressive array of inducements to legislators, including information, political support, future jobs, PAC contributions, and fact-finding junkets).

<sup>199</sup> See Burnham, *supra* note 130, at 103-04 (voter abstention, especially by less educated and poorer voters, is due to decline of parties and the "breakup of electoral coalitions along office-specific lines and the rise of personalistic incentives to replace team incentives").

<sup>200</sup> The traditional principal-agency analysis would presumably view the independence in this manner. See Jensen & Meckling, *supra* note 189, at 308 (a principal must incur monitoring costs to limit agent's divergence from the principal's best interests).

<sup>201</sup> Technically, only when one's preferred candidate wins by one vote can the individual voter claim that her vote made the difference. Given the difficulty of predicting what the preferred candidate will do in the future (in contrast to the opponent) and

cians in this context might be overly inclined to take dramatic stands that draw media attention to themselves or pursue activities that enhance postgovernment opportunities.<sup>202</sup> For all of these reasons, the ability to elevate the public-regarding motivations of legislative actors through a system of political dispersion remains uncertain in a world where some popular control still exists.

### b. *Impact on Collective Action*

Equally important, whatever its effect on legislative motivation, these changes are likely to influence perversely government decision-making—that is, collective action coordination. As discussed above, the dispersal of power increases the ability of narrower groups to secure an effective foothold in government. By seeking to create a multitude of legislative actors with independent authority, the civic virtue strategy tends to afford more groups an opportunity to gain *some* influence.<sup>203</sup>

Once groups have been assured of a presence, moreover, the dispersal of power among legislative officials creates serious perverse incentives in operating government. As explained above, individual groups and actors have an incentive to pursue their narrow interests at the expense of more diffuse concerns, since their contribution will be more significant on the former than the latter.<sup>204</sup> The end result of a dispersion of power might then be a system of government in which narrow interests may be pursued at the expense, and to the detriment, of diffuse values. On balance, there is no strong evidence that existing proposals to increase marginally the independence of legislators would sufficiently transform the motivation of members of Congress to

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the often tenuous linkage between the delivery of government services and one's own economic well-being, the *causative* significance of the lone vote in a major election becomes quite low. See N. FROHLICH & J. OPPENHEIMER, *POLITICAL ECONOMY* 97-116 (1978); R. HARDIN, *supra* note 20, at 11. For this reason, it may not be instrumentally irrational for the public to vote for civically virtuous reasons. See A. DOWNS, *supra* note 40, at 270 (arguing that a voter receives "long-run participation value" in return for participating in the democratic process, namely, the benefit of living in a democratic society). Admittedly, however, a voter may still view the franchise in narrowly instrumental terms, but subjectively believe hers *could* be the marginal vote that decides the election.

Of course, other types of individual political behavior, such as political contributions, especially through PACs, can offer certain voters substantial political influence. See L. SABATO, *PAC POWER* 10-16 (1985).

<sup>202</sup> See D. MAYHEW, *supra* note 35, at 68 (a member of Congress in electoral danger can innovate by "entrepreneurial position taking"); Nash, *supra* note 108, at B10, col. 6 (posturing by Senator Garn).

<sup>203</sup> See *supra* notes 35-36 and accompanying text.

<sup>204</sup> *Id.*

counteract these perverse tendencies.<sup>205</sup>

D. *Historical Precedent:*  
*Earlier Examples of Power Diffusion in Congress*

Indeed, the evolving institutional structure of Congress over the last thirty years offers compelling historical evidence that this strategy, in the current dispersed legislative environment, may be counterproductive. The Congress of the late nineteenth century and early twentieth century in many ways reflected the political science ideal: strong legislative leadership in the Senate and House controlled the voting on most decisions, with little defection by members.<sup>206</sup> This influence was facilitated by strong party identification within the electorate and large financial and other support distributed by the party to individual candidates for office.<sup>207</sup> At the same time, there was minimal rational dialogue or reflective analysis of legislation in committees of the House and Senate.<sup>208</sup>

Power in Congress, especially the House of Representatives, has become increasingly dispersed since that period. In the 1950's, accelerating earlier trends, the Speaker was displaced by committee chairs as the center of power,<sup>209</sup> leading to the serious difficulties in the early sixties with President Kennedy's legislative programs.<sup>210</sup> More recently, in the late 1960's and early 1970's, power has shifted to subcommittee chairmen and even individual members of Congress on each committee.<sup>211</sup> This decentralization of power can be traced to the increasing

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<sup>205</sup> The fact that political actors are already public spirited to some degree, *see supra* note 23, does not undermine this conclusion. To the extent that there is an existing reservoir of public spiritedness, the civic virtue approach would appear, if anything, less necessary.

<sup>206</sup> *See* D. PRICE, *supra* note 113, at 52; Cooper, Brady & Hurley, *The Electoral Basis of Party Voting: Patterns and Trends in the United States House of Representatives, 1887-1969*, in *THE IMPACT OF THE ELECTORAL PROCESS* 133, 137 (1977).

<sup>207</sup> *See* D. PRICE, *supra* note 113, at 51-53.

<sup>208</sup> *See* J. SUNDQUIST, *supra* note 116, at 369-72.

<sup>209</sup> During this period, there was a gradual transition from a "hierarchical" to a "bargaining" system of power management. *See* D. PRICE, *supra* note 113, at 56; *see also* S. SMITH & C. DEERING, *COMMITTEES IN CONGRESS* 28-30 (1984) (noting the "power broker" status of committee chairs during the 1947-1964 period).

<sup>210</sup> For a description of President Kennedy's troubles in civil rights and President Johnson's success in finally overcoming the legislative roadblocks to the Civil Rights Act of 1964, *see generally* C. WHALEN & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

<sup>211</sup> There is a voluminous literature on these structural changes. For general overviews, *see* R. ARNOLD, *CONGRESS AND THE BUREAUCRACY* 212-14 (1979); L. DODD & R. SCHOTT, *supra* note 35, at 106-29; M. FIORINA, *supra* note 35, at 62-67; N. ORNSTEIN, *CONGRESS IN CHANGE* 88-114 (1975); R. RIPLEY, *supra* note 178, at 324-27; Cooper, *Organization and Innovation in the House of Representatives*, in J.

electoral independence of members of Congress from party leaders and the president,<sup>212</sup> which in turn is a result of reduced popular party identification, increased media coverage, and enhanced opportunities for constituent services. In this situation, many members of Congress, particularly in the House, can virtually ensure their own reelection today without the assistance of the traditional sources of support—the party leaders and the president. Incumbency, not political party affiliation, is the most important determinant of a politician's electoral success.<sup>213</sup>

Unfortunately, the difficulty with this environment of independent and dispersed legislative power is that Congress is far less able to withstand the influence of narrow interest groups, especially as compared to the prior strong party system or strong presidency. A host of political scientists have detailed the increased influence of narrowly concentrated

COOPER & G. MACKENZIE, *THE HOUSE AT WORK* 319, 320-23 (1981); Davidson, *supra* note 178, at 102-108; Shepsle & Weingast, *supra* note 119, at 351-54.

<sup>212</sup> There is a growing analytic literature seeking to explain why Congress has moved to a decentralized or universalistic system, generally suggesting that it improves incumbent reelection prospects. See Niou & Ordeshook, *Universalism in Congress*, 29 AM. J. POL. SCI. 246, 256-57 (1985); Weingast, *A Rational Choice Perspective in Congressional Norms*, 23 AM. J. POL. SCI. 245, 249 (1979).

<sup>213</sup> Ninety-eight percent of incumbent House members won reelection in 1986. *The 98.4% Solution*, Wall St. J., July 22, 1987, p. 20, col. 1 (editorial). For academic discussion of incumbency, see M. FIORINA, *supra* note 35, at 19-23; G. JACOBSEN, *MONEY IN CONGRESSIONAL ELECTIONS* 101-04 (1980); Burnham, *Insulation and Responsiveness in Congressional Elections*, 90 POL. SCI. Q. 411, 412-15 (1975); Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AM. POL. SCI. REV. 166, 169 (1977); Ferejohn & Fiorina, *Incumbency and Realignment in Congressional Elections*, in *NEW DIRECTIONS*, *supra* note 93, at 91, 91-117; Kostroski, *Party and Incumbency in Postwar Senate Elections: Trends, Patterns, and Models*, 67 AM. POL. SCI. REV. 1213, 1215-20 (1973); Mann & Wolfinger, *Candidates and Parties in Congressional Elections*, 74 AM. POL. SCI. REV. 617, 620-21 (1980).

Recently, Gary Jacobsen has questioned the magnitude of the incumbency effect, suggesting that, while the margin of victory for incumbents has increased over the last two decades, their success rate has not altered dramatically. See Jacobsen, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives*, 31 AM. J. POL. SCI. 126, 133, 138 (1987). Assuming Jacobsen's interpretation turns out to be correct, and one views the 1984 and 1986 congressional elections as anomalies, incumbents still appear to enjoy a great deal of independence even under his analysis, especially with respect to their legislative policymaking activities. For example, Jacobsen recognizes that there is a distinct advantage to incumbency. See *id.* at 128. In his view, moreover, incumbents appear to be defeated more often on the basis of local parochial or personality challenges, not their congressional legislative activities. See *id.* at 136-37; see also G. PARKER, *supra* note 192, at 7 ("[T]he adoption of an attentive home style provided incumbents with a way of staying in office without subjugating their own policy preferences or goals to the whims of their constituents."); Ferejohn & Fiorina, *supra*, at 93 ("the 1984 election provides still more evidence of the continued importance of incumbency in congressional elections, the limited effect of presidential coattails, and therefore the limited capacity of national elections to impose a programmatic vision on a constituency-minded Congress"); Mann, *supra* note 152, at 268 (describing "the long term trend toward the insulation of House elections from national politics").

groups in this setting.<sup>214</sup> Thus, "[t]o the degree that legislative members are able to secure electoral independence, they are less dependent on executive success, less controlled by legislative leaders, and more capable of dealing independently with interest groups. [The result is] a more decentralized policy-making process *with greater room for particularistic considerations*."<sup>215</sup>

Paradoxically, these developments, generally lamented by political scientists, appear to be welcomed, if not demanded, by the logic of civic virtue theory. The substantial job security afforded by incumbency voting<sup>216</sup> has made representatives far better able and inclined than their predecessors to debate pieces of legislation and challenge the party leadership, at least as evidenced by the increased length of committee hearings and floor debates.<sup>217</sup> Legislative deliberations over this period have

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<sup>214</sup> See, e.g., B. CAIN, J. FEREJOHN & M. FIORINA, *supra* note 151, at 14, 21; L. DODD & R. SCHOTT, *supra* note 35, at 98-99; M. FIORINA, *supra* note 35, at 66, 73; L. REISELBACH, *supra* note 181, at 88-89; K. SCHLOZMAN & J. TIERNEY, *supra* note 198, at 317; D. VOGER & S. WALDMAN, CONGRESS AND DEMOCRACY 91-97 (1985).

<sup>215</sup> B. CAIN, J. FEREJOHN & M. FIORINA, *supra* note 151, at 21 (emphasis added). These authors also observe that "party discipline unravels as increased resources and influence interact with electoral independence in a mutually reinforcing fashion. Power devolves to subunits; representatives feel free to defect on party votes; norms of party responsibility crumble; and responsiveness to national electoral verdicts gives way to bargaining among particularistic interests." *Id.* at 14. They conclude: "Faithful representation of particularistic constituency interests goes with decentralized policy making institutions. Such institutions tend to make distributive policies rather than regulatory and redistributive policies." *Id.* at 228.

Overspending and budget deficits may be just two of the results of the decline of party discipline. See R. Inman, *supra* note 166, at 30 (expansion of pork barrel legislation for state and local government during the 1970s was due to congressional transformation from a majority-controlled to a decentralized, universalistic system); A. WILDAVSKY, HOW TO LIMIT GOVERNMENT SPENDING 46-47 (1980) (as parties have declined, they have been less able to integrate demands of special interest groups).

The textual discussion, of course, deals with tendencies, not absolutes. The issue is whether *further* decentralization of an already dispersed and decentralized process is likely to improve decisionmaking.

<sup>216</sup> See L. DODD & R. SCHOTT, *supra* note 35, at 59 (members of Congress develop long term careers that may last as long as forty years); M. FIORINA, *supra* note 35, at 5-6 (discussing the "professionalized Congress" of the twentieth century); see also *The 98.4% Solution*, *supra* note 213, at 20, col. 1 ("House elections today have become pro-forma exercise" with House members enjoying "lifetime tenure"). The same holds true, to a lesser extent, for members of the Senate. See Ferejohn & Fiorina, *supra* note 213, at 96 (although "Senate races are more competitive than House races[, t]here is little evidence that national issues and conditions exert any more of an across-the-board effect in Senate campaigns than in House campaigns").

<sup>217</sup> See J. SUNDQUIST, *supra* note 116, at 369-73, 391; Davidson, *supra* note 178, at 124-26; Yang, *Chaotic Congress: Lawmakers' Inability to Clear Up Gridlock Is a Rising Frustration*, Wall St. J., March 21, 1988, at 1, col. 1. But see Greenhouse, *Professor in Congress Is Doing Homework on Theory and Reality*, N.Y. Times, Feb. 11, 1988, at A20, col. 4 (noting recent decline in committee hearings due to centralization of budget process).



also tended to be more ideological.<sup>218</sup>

Indeed, civic virtue theory is, in effect, exploring ways to accelerate this trend, seeking to further stimulate committees and representatives to consider and debate legislation and express their judgment about the legislation in principled terms. At least as an ideal, legislators are presumably not to demand party loyalty or make decisions based on the fact that the party leader had given directions. Nor should they make deals based exclusively on a particularistic self-interested intention to hold a coalition together. Unfortunately, these practices, while inconsistent with rational dialogue, are also mechanisms that serve to bind dispersed centers of power into collective entities capable of voting as a majority unit. In short, these devices not only help sustain party politics within a system of majority rule, but also counteract the influence of special interest groups.

This history also underscores two other points. First, the dispersion of authority in Congress suggests there may be a substantive difference between facilitating deliberation and dialogue within the legislative process, as opposed to within the administrative process, where it first received its strongest support in public law scholarship.<sup>219</sup> Because administrative agencies are more likely to be, and are more easily, hierarchically organized, imposing a deliberative obligation upon decisionmakers—cabinet secretaries or their immediate subordinates—is less likely to disperse authority.<sup>220</sup> Within the legislative process, on the other hand, where political actors are formal equals, enhancing deliberation and insulation within a collectivity is more apt to decentralize power and undermine central majority influence.<sup>221</sup> Owing to the dif-

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<sup>218</sup> See Sinclair, *Building Coalitions in Congress*, in *THE NEW CONGRESS*, *supra* note 178, at 178, 217-20. Indeed, in contrast to the 1950s, members of Congress now generally perceive their role as serving as a trustee for their constituents, rather than as a delegate. See Parker, *supra* note 192, at 26. Not surprisingly, the current decentralized legislative environment appears to be more conducive to the generation of new ideas. See M. DERTHICK & P. QUIRK, *supra* note 23, at 252-58; Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 370-72 (J. Wilson ed. 1980); Wilson, *American Politics Then and Now*, *COMMENTARY*, Feb. 1979, at 39, 42-44; cf. *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (discussing the need for "exploration" of ideas by federal circuits to illuminate them for proper resolution by the Court).

<sup>219</sup> For a discussion of the hard-look doctrine, designed to promote deliberation in the administrative context, see *supra* note 101.

<sup>220</sup> Since the actual dialogue in administrative agencies can occur in a closed forum and is subject to essentially final judgment by only one person—the agency head or a designee—it is less likely to disperse authority within the agency, or create collective action problems. For an insightful comparison of the other differences between the legislative and administrative processes in this context, see Bruff, *supra* note 43.

<sup>221</sup> See *supra* notes 169-79 and accompanying text (discussing reasons why civic virtue proposals are likely to disperse authority in the legislative process). To counteract this dispersion, Sunstein recently has argued for reinvigorating checks and balances

ference in organizational structure, the lessons of the civic virtue experience in the administrative context—which are themselves open to some difference of opinion—cannot be uncritically generalized to the legislative arena.<sup>222</sup>

Second, on the basis of this history, it also should be recognized that certain techniques which epitomize self-regarding behavior may actually facilitate the ideological orientation of various participants in the political system. Nobody has satisfactorily resolved the exact method by which representatives will be able to exercise civic virtue without popular accountability to an often private-regarding public.<sup>223</sup> In Sunstein's eyes, the insulation of representatives provides the necessary discretion for the exercise of virtue.<sup>224</sup> Macey, on the other hand, appears to assume that true popular scrutiny will facilitate public-regarding activities.<sup>225</sup>

The history of Congress over the past thirty years suggests that the answer often falls in between: legislators' pursuit of their most particularistic functions—local pork barrel legislation and constituent servicing—actually *frees them* to engage in more ideological activities.<sup>226</sup> To

in the administrative process through heightened review of agency rulemaking by courts and the Office of Management and Budget. To the extent that this system affords the president and his staff final decisionmaking authority, it would appear to centralize decisionmaking further, and indeed is defended by Sunstein on that ground. *See* Sunstein, *supra* note 65, at 457-60. On the other hand, Sunstein also supports review in this context on dispersion grounds, advocating intervention by the president, his staff, and courts as competitive sources of authority within the executive branch. *See id.* at 489. Thus, it is unclear what the ultimate effect or purpose of his proposals will be in the administrative context.

<sup>222</sup> *See supra* note 101 (discussing the hard look doctrine in the administrative context). Strategies may be developed that will stimulate a rational dialogue in a collegial body without insulating political actors from popular accountability or dispersing effective political authority. Indeed, this Article suggests below two areas for further inquiry. The discussion, however, does underscore the need for such an analysis.

<sup>223</sup> *See supra* notes 105-10 and accompanying text.

<sup>224</sup> *See* Sunstein, *Interest Groups*, *supra* note 18, at 34-35.

<sup>225</sup> *See* Macey, *supra* note 18, at 254 ("This publicity provides information to those affected by the legislation to organize coalitions to protest it.").

<sup>226</sup> Specifically, representatives are able to build stable home constituencies by delivering discrete benefits, such as local projects and constituent services, to their districts. This electoral security can offer representatives greater independence in their traditional legislative responsibilities. *See* J. JOHANNES, *TO SERVE THE PEOPLE* 1-5 (1984) (the "burgeoning and increasingly specialized staffs, the expansion of congressional offices in home districts and states, [and] a concomitant growth in federal agency congressional liaison offices [form] an important element of the broader representative function"); G. PARKER, *supra* note 192, at 171 (as a result of an attentive home style "electoral safety increased . . . and members gained a measure of freedom from their constituents to pursue legislative goals, such as policy influence or power"); *id.* at 28 ("By behaving like delegates in terms of their attentiveness to district affairs, trustees create levels of constituent trust comparable to that created by the representational styles of delegates. This enables trustees to exercise a measure of freedom in their pol-

the extent this continues to be true, adoption of a civic virtue standard may actually undermine public-regarding debate by making such particularistic activities unconstitutional. Paradoxically, the most private-regarding legislation enhances the ability of legislators to engage in ideological, principled activities in other contexts.

## VI. OTHER POTENTIAL DRAWBACKS TO THE CIVIC VIRTUE PERSPECTIVE: STRUCTURAL AND POLITICAL CONSERVATISM

In addition to its influence on special interest groups, the civic virtue approach has the *potential*, in some cases, for incurring other costs—reducing the overall rationality of government programs, promoting gridlock, and diminishing the political influence of poorer groups—all problems, paradoxically, that it is ostensibly intended to alleviate.<sup>227</sup> Although all of these tendencies have been alluded to above in the general discussion of the political party literature, it is now appropriate to discuss more precisely some of the other tradeoffs associated with the civic virtue perspective.

### A. *The Civic Virtue Vision Revisited*

As noted above, civic virtue is to a large degree a theoretical response to interest group politics,<sup>228</sup> which has long been criticized on the ground that it supposedly lacks a coherent defense for the logic of the results it attains, other than the unreflective satisfaction of certain—usually wealthy—interest group desires.<sup>229</sup> As a solution, efforts to stimulate civic virtue are thought to produce more rational and

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icy behaviors.”); M. FIORINA, *supra* note 35, at 51 (“Experience in Washington and congressional seniority count when dealing with the bureaucracy. . . . This incumbency effect is not only understandable; it is rational.”); cf. R. FENNO, *supra* note 151, at 151 (once a member wins her constituents’ trust, the member has greater leeway in voting on the vast majority of issues).

<sup>227</sup> While these issues cannot be developed in detail here, they are important in illustrating additional questions raised by importing a legal or dialogic model of decisionmaking into the political process. They also serve to illustrate a difference in professional perspective between political party scholars, who tend to focus most on the exercise of power, and academic lawyers, who are concerned with the articulation of ideas. Of course, these differences merely represent contrasting prototypes that characterize many, but certainly not all, individuals in the two areas.

<sup>228</sup> See *supra* notes 37-41, 44-46 and accompanying text.

<sup>229</sup> See T. LOWI, *THE END OF LIBERALISM* 311-13 (1969); K. SCHLOZMAN & J. TIERNEY, *supra* note 198, at 402; Kariel, *The Pluralist Norm*, in *FRONTIERS OF DEMOCRATIC THEORY* 139, 158-59 (H. Kariel ed. 1970); Lowi, *The Public Philosophy: Interest Group Liberalism*, in *THE BIAS OF PLURALISM* 81, 107-14 (W. Connolly ed. 1969).

thoughtful government policies. Historically, this belief in a rational moral consensus can be traced to the antifederalists.<sup>230</sup> And the Madisonian response, according to Sunstein, was at least partially predicated on the understanding that there existed an understanding of the common good toward which an elite public-regarding dialogue would converge.<sup>231</sup> The result was and is an appealing republican vision: political actors who are intentionally considerate of the general consequences of their actions—and are required or led to formulate and explain their judgments in terms of general ethical norms and goals—should be more apt to frame rational and morally defensible public policy.<sup>232</sup>

From a qualitatively different perspective, though reaching an analogous conclusion, one can speculate that ideological and deliberative politics, in contrast to pure interest group politics, may lead to more rational public policy simply because voter ideological positions, from liberal to conservative, may be more consistent, or “single peaked,” than they are in a splintered interest group system.<sup>233</sup> If true,

<sup>230</sup> See Sunstein, *Interest Groups*, *supra* note 18, at 35-38; see also G. STONE, *supra* note 193, at 5-6 (the antifederalists believed that in small communities it “would be possible to achieve the sort of homogeneity, and dedication to the public good, that would prevent government from degenerating into a clash of private interests”); Michelman, *supra* note 49, at 19 (The antifederalists opposed an expanded national sphere because it “would lack the spiritual and material homogeneity, . . . required to support and reward unselfish devotion to the common good . . .”).

<sup>231</sup> Sunstein, *Interest Groups*, *supra* note 18, at 41; see also C. Sunstein, *supra* note 18, at 16 (“The requirement of deliberation embodies substantial constraints that in some settings lead to uniquely correct outcomes.”).

<sup>232</sup> See Ackerman, *supra* note 18, at 1033; Mashaw, *Constitutional Deregulation*, *supra* note 18, at 857-60, 867, 875-76; C. Sunstein, *supra* note 18, at 16, 22-24. Along similar lines, various political scientists have described the United States as possessing a consensual ideology. See L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 11 (1955); S. HUNTINGTON, *supra* note 93, at 6-7. Indeed, Ackerman’s theory of high and low politics is predicated on the conclusion that Americans reach a rough type of consensus during high political moments. See Ackerman, *supra* note 18, at 1049-50. There is some debate, however, whether one should view any American “ideology” as necessarily attractive. Compare D. PRICE, *supra* note 113, at 9 (“most Americans remain ‘operational liberals,’ favoring a range of activist governmental programs and policies, even when they regard themselves as conservatives”) with S. HUNTINGTON, *supra* note 93, at 41 (American ideological consensus is inconsistent with practical operation of modern government). Cf. S. VERBA & G. ORREN, *supra* note 23, at 255-56 (1985) (American leaders are less in favor of income equality than their Swedish counterparts). See generally Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 738-44 (1983) (discussing advantages of cycling and pluralism as a means of avoiding consensual fascism and revolution).

<sup>233</sup> See Miller, *supra* note 232, at 741; cf. Macey, *supra* note 18, at 259 (interpretations of special interest statutes are more likely to be multi-peaked than explicitly public interest statutes). Similar observations have been made about deliberation in the judicial and administrative context. See Kornhauser & Sager, *supra* note 163, at 101 (criticizing the application of Arrow’s theorem to judicial deliberations because judges are expressing a judgment, not a preference); Mashaw, *supra* note 116, at 99 (in the administrative process, “research factfinding, or natural experimentation with alterna-

the exercise of civic virtue may, by increasing the likelihood that voters' policy preferences will be interconnected, make resulting decisions more logically consistent.

Finally, in addition to its consequences for deliberative public policy, a return to public-regarding dialogue has been advanced on the grounds that it is likely to help certain groups, especially the poor,<sup>234</sup> not only to express their interests, but to succeed within the political arena.<sup>235</sup> According to this perspective, the attraction of a public-regarding dialogue, like the courtroom model from which it draws intellectual sustenance, is that ideas are important for their own sake and will succeed or not succeed regardless of the power or resources of those who present them. Thus, ideas or arguments that are influential *merely* owing to the power or numerical support of their proponents would be less likely to predominate, or if successful in the legislative arena, would be struck down as unconstitutional.<sup>236</sup> Those who serve to benefit from existing organizational support—disproportionately the wealthy and powerful—would be less likely to exercise influence.<sup>237</sup>

### B. Civic Virtue and Deadlock

The first difficulty with the above analysis is that the primary strategy for inducing virtue—insulation and dispersal of authority—may have the unintended effect of introducing a conservative structural bias into the political system. Promoting rational debate by creat-

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tive policies [can] produce a unified view or construction of reality that ultimately yields a rational or transitive collective ordering of preferences").

<sup>234</sup> Scholars cite diffuse groups such as the poor as the losers in a traditional pluralist system, since they lack money and often existing organizations support for asserting political power. "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper class accent." E. SCHATTSCHEIDER, *SEMI-SOVEREIGN*, *supra* note 114, at 35; see also Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM*, *supra* note 229, at 3, 15 (summarizing the critics' view that "the pluralist system is significantly biased toward the concerns of corporate elites"). While the extent of this effect has been the subject of extensive debate, the most comprehensive study to date suggests that there is a continued bias. See K. SCHLOZMAN & J. TIERNEY, *supra* note 198, at 87-88, 395-403.

<sup>235</sup> See C. Sunstein, *supra* note 18, at 19-21. But see Michelman, *supra* note 49, at 21-27 (noting the limitations of republicanism). Decentralized political environments are also thought to increase the opportunity for political participation, especially by groups otherwise not contained in the ruling coalition. See B. BARBER, *STRONG DEMOCRACY* 267-73 (1984); Rapaczynski, *supra* note 65, at 395-404; Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918 (1985).

<sup>236</sup> See Sunstein, *Interest Groups*, *supra* note 18, at 69; C. Sunstein, *supra* note 18, at 19-21.

<sup>237</sup> There is much that is attractive about these arguments, which track normative defenses of the adjudicative process. See Weisberg, *supra* note 1, at 239-43. While a dialogical process takes time, the fuller discussion is the exact purpose of public-regarding dialogue, as the civic virtue proponents observe.

ing separate centers of authority within Congress and between Congress and other institutions increases the probability that each institution and group will pursue its own program. When there is no legal or political requirement that agreement be reached or that popular policy initiatives be consistent with one another, this can lead to inconsistent outcomes (where bargains occur) or stalemate.<sup>238</sup>

In contrast, the classic function served by political parties oriented toward gaining a majority of the vote is to require that agreements be reached. Electoral fragmentation, as the experience over the deficit has shown, can lead to the opposite result— "[d]estabilization of domestic policy initiatives and follow—through . . . ." <sup>239</sup>

The problem is exacerbated by the tendency of some ideologically tinged discussions, however achieved, to make compromise and consensus *more* difficult among elite political actors and the public.<sup>240</sup> Precisely because pluralist nondialogical politics does not raise fundamental questions of morality and government policy, it may be better able

<sup>238</sup> The most frequently cited examples in our current system are the government's economic and energy policy. See Fiorina, *supra* note 108, at 39. For writers making this criticism of dispersed power in the separation of powers context, see J. BURNS, *THE DEADLOCK OF DEMOCRACY* 323 (1963) (criticizing the Madisonian model of government in which "government action has been unduly delayed" by a requirement for "us to await a wide consensus before acting"); J. SUNDQUIST, *supra* note 133, at 7-12 (discussing the disintegration of political parties and the absence of effective congressional or presidential leadership as factors contributing to the crisis of competence in government).

This argument has been forcefully made in the report of the Blue Ribbon Committee on the Constitutional System, see COMMITTEE ON THE CONSTITUTIONAL SYSTEM, *supra* note 133, at 5-6, whose Co-Chairman recently described this problem in the context of the budget deficit:

All elected politicians, from the President to the most junior member of Congress, agree that this growing cancer must be removed, and they each have a plan to do so. Each of these plans would reduce the annual deficit by twenty-five to fifty percent per year over the next several years, but they would do so in differing ways. Any of these plans would be better than letting the deficits continue to accumulate at their present annual rate. But those we elect cannot form a consensus about which plan to adopt, and the cancer continues to grow.

Cutler, *supra* note 133, at 28 (footnote omitted).

<sup>239</sup> Burnham, *supra* note 114, at 352.

<sup>240</sup> The following discussion relies primarily upon an empirically and historically based political science literature that raises various concerns about "ideological" politics. While these scholars draw a distinction between ideological and interest group politics, just as a distinction is offered between "reasoned dialogue" and pluralism in the civic virtue literature, few writers delineate with precision what is meant in the real world by ideological politics as opposed to interest group pluralism. As a general matter, ideological politics appears to be marked by moralistic, symbolic, and abstract political appeals and debate, as distinguished from appeals to a group or individual based on perceived instrumental self-interest. See J. WILSON, *supra* note 130, at 3-4, 17-20; Orren, *supra* note 157, at 6-8.

to achieve compromise and agreement.<sup>241</sup> A major school in political science views "[p]ragmatic, professional political parties with their tendency toward coalition and compromise [as] an important bulwark against moralistic and extremist politics."<sup>242</sup> Conversely, "[t]he weak partisan limited-issue and personalistic politics of recent vintage are poor foundations for governing."<sup>243</sup>

Significantly, this conclusion is the opposite of what many advocates of "reasoned dialogue" expect: rational deliberation and exploration of fundamental values are intended to facilitate acceptance of and respect for an opponent's position.<sup>244</sup> Unfortunately, ideological politics can *increase* participants' intransigence and unwillingness to accept the autonomy of divergent groups.<sup>245</sup> Coalitional politics, on the other

<sup>241</sup> See A. RANNEY & W. KENDALL, *DEMOCRACY AND THE AMERICAN PARTY SYSTEM* 507-08 (1956); J. WILSON, *supra* note 130, at 22; Wildavsky, *supra* note 170, at 257-69. Related concerns underlie the view that some decisionmaking is best undertaken through "incremental," rather than comprehensive, analysis. See Diver, *Polymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 400, 430 (1981) (discussing the administrative process); Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79, 86 (1959) (same). See generally C. LINDBLOM, *supra* note 38, at 205-25 (outlining various aspects of the process by which decisions are made through "partisan mutual adjustment").

<sup>242</sup> Orren, *supra* note 157, at 30.

<sup>243</sup> *Id.* at 25.

<sup>244</sup> See C. Sunstein, *supra* note 18, at 22-23, 51-54; see also J. RAWLS, *supra* note 44, at 358 ("In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us."); *supra* note 147 and accompanying text (discussing the civic virtue theorists' belief in an objective morality).

Indeed, a longstanding debate has raged within political science over whether parties should become, on the one hand, more ideological, presenting tightly packaged consistent programs to the public, or, on the other hand, should become coalitional, deemphasizing the ideological bent of their proposals in order to remain attractive to the broadest spectrum of voters and to facilitate subsequent governance. The controversy has focused on the 1950 American Political Science Association Report by the Committee on Political Parties, which called for a stronger and more ideological two party system. See AMERICAN POLITICAL SCIENCE ASS'N, *supra* note 115, at 1-2.

In contrast to pluralist politics, ideological politics has also been criticized on the grounds that it may lead to instability or even fascism. See M. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* 16-18 (1967) (summarizing pluralist writers adopting this perspective). It is doubtful, however, whether civic virtue, which is conceived of in many respects as a dispersed elite dialogue, is subject to this charge. A system of dispersed, nonconsensual politics may well diminish the possibility of this problem. See Miller, *supra* note 232, at 738-44 (discussing the benefits of cyclical majorities in promoting stability).

As a practical matter, in part as a reflection of the greater heterogeneity of American society, American political parties have tended to be less ideological than their European counterparts. See J. SUNDQUIST, *supra* note 116, at 471-72.

<sup>245</sup> See J. WILSON, *supra* note 130, at 358 ("[t]he need to employ issues as incentives and to distinguish one party from the opposition along policy lines will mean that political conflict will be intensified, social cleavages will be exaggerated, party leaders will tend to be men skilled in the rhetorical arts, and the party's ability to produce agreement by trading issue-free resources will be reduced."); Wildavsky, *supra* note

hand, where legislators more often bargain for, logroll, and compromise interests, may lead to greater acceptance of alternative views and interests, giving "to each group *some* but never all of what it wants."<sup>246</sup> Thus, the *process* of decisionmaking may have a significant influence on the value preferences of the general population and its representatives, though in the exact opposite manner than civic virtue theory envisions.<sup>247</sup>

### C. Civic Virtue and Popular Accountability

In addition to its effect on compromise, ideological politics can also reduce democratic accountability and rationality in the electorate, especially among poorer and less educated voters. If true, this may raise the specter of greater elite dialogue being achieved at the expense of popular understanding.

As noted above, scholars have praised party identification because it supposedly "offers the best clue to candidates' positions on a range of issues, the interests they will be at pains to accommodate, the cooperative ties they will be able to establish, and the kinds of people they will be likely to bring into government."<sup>248</sup> The decline of party identification, and the rise of single issue politics, some have argued, may have decreased popular accountability and rationality; voters, especially the poor and less educated, are frequently at a disadvantage, through a type of information overload, in evaluating specific issues on a mass level.<sup>249</sup> The result, paradoxically, is that "[c]andidate appeal" is often based on the most superficial, contrived kind of media image"; ultimately, "incumbent voting has loosened the link, not only between the issue positions of individual voters and their representatives, but also between national public opinion trends and Congress as a whole."<sup>250</sup>

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170, at 253-54 (referring to an observation about Goldwater delegates in 1964: "I don't understand them at all; they talk like they don't care if we win;" and quoting a delegate: "I'd rather stick by the real principles this country was built on than win.").

<sup>246</sup> A. RANNEY & W. KENDALL, *supra* note 241, at 508.

<sup>247</sup> Indeed, Congress has frequently been criticized on the grounds that "officials do not govern, they merely posture." Fiorina, *supra* note 108, at 44; *see also* Nash, *supra* note 108, at B10, col. 6 (discussing "posturing" by members of Congress). Placing primary emphasis on what politicians say runs the risk of exacerbating this phenomenon; the electoral requirement would continue to be "not [to] make pleasing things happen, but [to] make pleasing judgmental statements." D. MAYHEW, *supra* note 35, at 67.

<sup>248</sup> D. PRICE, *supra* note 113, at 110; *see also* W. HAWLEY, *supra* note 132, at 145-49 (discussing the advantage of partisan elections); *supra* note 130-32 (discussing the benefits of party identification).

<sup>249</sup> *See* Burnham, *Shifting Patterns of Congressional Voting Participation, 1981* in W. BURNHAM, *supra* note 132, at 196.

<sup>250</sup> D. PRICE, *supra* note 113, at 110.



As a result, a philosophy or system that seeks to stimulate an even more dispersed ideological debate has the potential for reducing popular understanding and accountability.

Of course, in some respects, civic virtue theory may envision only elite discussion. As Madison originally proposed, members of Congress would be relatively insulated from direct accountability through such devices as indirect election of Senators.<sup>251</sup> Regardless of the original intent of the Framers, however, under our current constitutional framework, representatives are directly accountable to the public and are likely to remain so. In this context, a system geared toward generally promoting ideological debate may have a perverse influence on the ability of the general population, though probably not of concentrated specialized interest groups, to judge the quality of their government and representation.

#### D. *Civic Virtue and Political Conservatism*

Finally, there is some question whether this system will even promote the interests of the poor. As noted, the assumption of the civic virtue approach is that changing the language of the legislative dialogue—either through constitutional review, statutory construction, or enhanced procedures—will indeed transform the dynamics of the legislative process, and the nature of its output.<sup>252</sup> Even assuming these techniques are effective,<sup>253</sup> however, it is still likely that certain groups will be able to pursue their goals (or depending upon one's perspective, their interests) within an ideological or public-regarding sphere.

Although generalizations about the relationship between ideological orientation and class background can be quite hazardous, legislators and groups historically have employed symbolic language to pursue policies that disadvantage the working class, beginning with the Progressive movement, and the nineteenth and twentieth century urban reform movements.<sup>254</sup> During the 1950's and 1960's, moreover, political scientists observed large differences in the conceptual understanding of elite and nonelite groups within American society, finding that "as one moves from elite sources of belief systems downwards . . . the concep-

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<sup>251</sup> See *supra* note 57 and accompanying text.

<sup>252</sup> Legislators who speak in public-regarding terms will be more likely to exercise their discretion to pursue public-regarding goals devoid of self-interest; where they lack independence, it will be more difficult for groups to pursue their private-regarding goals through public language. See *supra* notes 52-78 and accompanying text.

<sup>253</sup> As discussed above, there is some question about this conclusion. See *supra* note 98-103.

<sup>254</sup> See, e.g., E. BANFIELD & J. WILSON, *supra* note 133, at 46, 331-35; S. HAYS, *AMERICAN POLITICAL HISTORY AS SOCIAL ANALYSIS* 228-32 (1980).

tual grasp of 'standard' political belief systems fades out very rapidly."<sup>255</sup> While subsequent social changes, such as increased education, candidate appeals, and media coverage have reduced this divergence,<sup>256</sup> it still is probably true that "individuals manifest issue positions with more consistency on local issues and on specific issues than on general political [ideological] issues."<sup>257</sup> To the extent this is the case, attempts to elevate political dialogue may have a disproportionate impact on the influence of the less wealthy and less educated.<sup>258</sup>

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<sup>255</sup> Converse, *The Nature of Belief Systems in Mass Publics*, in D. APTER, *IDEOLOGY AND DISCONTENT* 206, 213 (1964). Much of this literature is from the 1960's. See, e.g., G. ALMOND, *THE AMERICAN PEOPLE AND FOREIGN POLICY* 126-30 (1961); A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *supra* note 130, at 366-68; McCloskey, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 372 (1964); Prothro & Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. OF POL. 276, 287-88 (1960). More recently, political scientists have found continuing evidence of this discrepancy. In describing this divergence, W. Russell Neuman states:

The mass public apparently responds to political stimuli in fundamentally different ways from those of political elites. The generally held belief among elites that the public understands political abstractions is an optical illusion, generated by the fact that the elite stratum is consumed in political conversation with itself and only rarely has occasion to discuss politics with the apolitical mass citizenry.

W. NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* 22 (1986).

<sup>256</sup> The ideological sophistication of voters appears to have increased during the 1960's and 1970's as a result in part of greater ideological appeals by candidates and political events. See N. NIE, S. VERBA & J. PETROCIK, *supra* note 114, at 307-11; Miller, Miller, Raine & Browne, *A Majority Party in Disarray: Policy Polarization in the 1972 Election*, 70 AM. POL. SCI. REV. 753, 776-78 (1976); Pomper, *From Confusion to Clarity: Issues and American Voters 1956-1968*, 66 AM. POL. SCI. REV. 415, 417-20 (1972). See generally G. POMPER, *VOTERS CHOICE: VARIETIES OF AMERICAN ELECTORAL BEHAVIOR* 178 (1975) (voters' "'political consciousness' has been raised, so that they are now better able to . . . respond electorally on the basis of particular issues, as well as more general and ideological stances").

<sup>257</sup> S. VERBA & N. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* 113 n.23 (1972); see also W. CROTTY, *supra* note 114, at 276-79 ("An issue-oriented electorate is one likely to increase the dominance of the better-educated and upper-income groups over electoral decisions. Lower socioeconomic groups face enormous difficulties in reincorporating themselves into the electorate without the political parties to encourage, organize, and guide their efforts."); R. HARDIN, *supra* note 20, at 123-24 (the poor are more likely to want monetary collective goods than "morally desired" goods); Burnham, *supra* note 130, at 132 ("The relative disappearance of partisan teams in campaigns and their replacement by personalistic and imagistic appeals to voters create conditions that make individual utility calculations difficult, if not impossible[ , with the result that] some people will remain far better positioned to make accurate utility calculations than others"). Of course, the magnitude and significance of the divergence in conceptual and ideological orientation of the mass public and elites is a continuing subject of debate. See generally W. NEUMAN, *supra* note 255, at 169-89 (discussing variations in political sophistication among different social strata).

<sup>258</sup> To be sure, it is possible to argue that conservative beliefs, and the interests of the well-off, are more likely to predominate in an ideological debate, regardless of the

Indeed, this concern with the transformation of the debate and its concomitant impact on lower echelons of society finds support in the historical literature on the decline of the party system and party identification. Political parties, which traditionally were based partly on particularistic incentives, have tended disproportionately to serve the interests of lower and working classes and have been important devices for enhancing voter turnout among these classes. With their relative decline and the rise of personalistic and single-issue ideological politics, some believe the upper class may have a qualitative advantage in pursuing its political agenda, due both to a disproportionate decrease in voter turnout among the lower and working classes and to these groups' relative disadvantage in participating in elevated political debate.<sup>259</sup> While it is possible that these historical trends cannot be extrapolated into the future—that perhaps “a higher order of electorate is evolving . . . with a direct concern for policy outcomes”<sup>260</sup>—the current evidence does not point strongly in that direction.

Of course, Sunstein has attempted to deal directly with this problem, positing a constitutional prohibition against enforcing ideological arguments that are based on “existing relations of power.”<sup>261</sup> Unfortu-

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self-interest of the participants. But the concern is that the predominance is due not to the inherent persuasiveness of the position, but to the power such groups have over the education and ethos of the society and the relative lack of influence less educated groups in society have in this sphere. The potential bias of such a consensus in the United States is noted *supra* note 232. Analogous criticisms have been made more generally of claims to objectivity in legal analysis. Compare Brest, *supra* note 4, at 772 (commitment to “the rule of law really seems [to be] a commitment to the rule of our law”) with H. COLLINS, *MARXISM AND THE LAW* 43 (1982) (“laws enacted according to the dictates of a dominant ideology will appear to the members of that society as rules designed to preserve the natural social and economic order”).

<sup>259</sup> See Burnham, *supra* note 130, at 132-33. Over two-fifths of eligible American citizens, disproportionately drawn from the poor and the less educated, do not vote, a far different statistic than in other western industrial counties. See *id.* at 97; see also W. BURNHAM, *supra* note 249, at 196 (the mass electorate is “baffled by the complexity of our constitutional arrangements, has extremely low levels of information, and has not been educated by any social instrumentality . . . to an understanding of politics”); Thus, at least on a national level, the possibility exists, contrary to the classic civic virtue view, see C. Sunstein, *supra* note 18, at 24-26, that dispersion of authority to increase points of access will decrease general popular participation.

Curiously, this differential in voter turnout may be less significant during periods of critical elections (or so-called high political moments). See Burnham, *supra* note 130, at 105. For a discussion of Ackerman's proposed system of judicial review, relying generally on judicial construction of popular understandings arguably reached during such periods, see *supra* notes 92-97 and accompanying text.

<sup>260</sup> W. CROTTY, *supra* note 114, at 282.

<sup>261</sup> Sunstein, *Interest Groups*, *supra* note 18, at 57. As noted above, Rawls' original position seeks to eliminate the effect of self-interest in two senses: the decisionmaker has no knowledge of her own position in society nor of her preexisting value system—values that may tend to further those interests. See *supra* notes 44-46 and accompanying text. Sunstein seeks to deal with both of these problems by his proposal that

nately, it is unclear how this requirement would achieve his progressive goals, that is, how Sunstein would "objectively" distinguish those normative arguments that are acceptable from those that are not. Two approaches arguably might serve these purposes, but neither appears to be promising.

First, one may believe that any argument that furthers or supports the existing power structure should be declared invalid for that reason. A rigid application of this approach, however, would obviously lead either to chaos or uniform equality. By invalidating any ideological argument that supports the power structure, the courts would presumably become supporters of all arguments in favor of those out of favor. The result would either be a cycle of acceptable and unacceptable doctrines—depending simply upon who is in control—or strict equality. In the end, the invalidation of an argument merely because it supports those with influence lacks any normative bite.

Second, Sunstein may be positing the existence of a neutral theory of dialogue that all positions advanced in a sanitized political debate would need to satisfy in order for the courts to find them constitutional.<sup>262</sup> According to this view, certain types of arguments, even though not referring to the promotion of a group's special interest, would still be unacceptable because they do not satisfy some transcendent level of neutral dialogue. Presumably, arguments in support of the existing power structure would be more likely to be held invalid, though certainly not necessarily.<sup>263</sup>

Unfortunately, Sunstein has not presented any system for delineating the bounds of this neutral dialogue.<sup>264</sup> Rawls' own effort has not

normative ethical arguments that are themselves based on what he calls "power relations" should be struck down as unconstitutional. See Sunstein, *Interest Groups*, *supra* note 18, at 54-55. This proviso is critical to the theory, for in the absence of such a restraint, the end result of the principled debate may not be any better—indeed it could even be worse—than the private interest debate to which he is objecting.

<sup>262</sup> Sunstein intends to make this second argument. Telephone conversation with Cass Sunstein (Mar. 18, 1988).

<sup>263</sup> This system of neutral dialogue would serve to reintroduce on a substantive level what Rawls had hoped to achieve through the veil of ignorance—a filtering out of ideological views that were adopted merely because of the influence of certain powerful groups within the society.

<sup>264</sup> Indeed, he recognizes:

If the ideas of endogenous preferences and cognitive distortions are carried sufficiently far, it may be impossible to describe a truly autonomous preference . . . . It is difficult indeed to generate a baseline from which to describe genuine autonomy, and an approach that tries to abstract entirely from social premises is unlikely to be fruitful.

Sunstein, *supra* note 48, at 1170-71. Ackerman has probably made the most sustained effort to articulate such a standard. See B. ACKERMAN, *supra* note 24, at 18 (developing norms for liberal society based on a system of "Neutral dialogue").

proved resistant to charges that individuals placed behind a true veil of ignorance may lack sufficient information or be devoid of necessary human qualities. In the absence of a veil, on the other hand, rational dialogue appears to lead to quite disparate outcomes and be subject to the claims of bias that the veil sought to avoid.<sup>265</sup>

More fundamentally, Sunstein's substantive approach seems in tension with his original goal of perfecting the political process. If indeed a deductive theory of ethics exists, and courts are able to discern it, it would appear most reasonable for courts independently to formulate those principles, as some academics have already suggested.<sup>266</sup> Why should the legal system transform political processes into public-regarding dialogues if the nature of acceptable decisions are apparent beforehand? In the absence of a fuller theory, then, the attempt to transform the legislative process into a deliberative discussion creates a risk that the debate will simply serve as a surrogate for preexisting interests.

This is not the place to attempt to resolve these vexing issues—the potential conservatism, structural rigidity, or lack of political accountability of civic virtue reforms. Their existence, however, underscores once again the need to appreciate the large costs of wholesale promotion of ideological thinking in Congress through constitutional intervention.

### CONCLUSION

This Article has evaluated the civic virtue proposals by sketching and contrasting two different strategies, or ideal types, for dealing with the special interest group problem. One approach, the civic virtue approach, seeks to imbue government actors with a public-regarding ethos, thereby ensuring through rational debate that representatives will give due consideration to the legitimate aspirations of all within the populace. The second approach, the political party approach, attempts to create centralized institutions that will aspire through electoral competition to serve the interests of the population as a whole, or at least a major portion of it.

To achieve their structural objectives, civic virtue writers focus attention on the insulation of political actors as the best method for stimulating deliberative dialogue and improving legislative motivations. Courts would require legislators to demonstrate that all the relevant actors had considered the issue, and that constituent or interest group

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<sup>265</sup> See *supra* notes 160-62 and accompanying text.

<sup>266</sup> See, e.g., Fiss, *Objectivity*, *supra* note 4, at 762; Fiss, *Foreword*, *supra* note 4, at 12-13.

pressure had not influenced their decisionmaking.

The political party approach, on the other hand, combats the special interest group problem by centralizing power, not dispersing it. Proponents of this view support the establishment of powerful central committees, the Gramm-Rudman-Hollings time limitations on legislative action, and the concentration of power in the president and party leaders.

Given the tensions between these two approaches and the recent history of legislative reform in Congress, however, any strategy in pursuit of civic virtue must be able to accommodate the traditional insights of political science, or else run the serious risk of producing quite unwelcome results. Even though it is probably impossible to return to an era of strong centralized presidential power or political parties, those advocating increasing insulation run the risk that their proposals will further enhance the influence of narrow self-interested actors, stimulate legislative deadlock, and disadvantage the nonelite electorate. As presently envisioned, the cost of this philosophy appears to be unacceptably high.

At the same time, there are possible avenues available for those wishing to transform political motivation that may not raise the same type of concerns. As discussed above, legislation like Gramm-Rudman-Hollings and constitutional amendments seek to transform political motivation without dispersing political responsibility or insulating actors from political accountability.<sup>267</sup> Rather, these devices attempt to induce public-regardingness by expanding the time frame of the decisionmakers.

Alternatively, it may be possible to achieve *some* of the goals of civic virtue writers, without undermining democratic principles, by promoting a strong ideological two party system. As noted above, a long-standing debate has raged within political science over the values of "ideological" versus coalitional politics.<sup>268</sup> Advocates of ideological political parties recognize all of the advantages of strong central political institutions, but also contend that political parties can and should them-

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<sup>267</sup> Of course, these systems raise different problems, a few of which were previously identified. See *supra* notes 232. *In theory*, a civic virtue system can enjoy one advantage over the traditional political party strategy which should be noted. While their defenders believe political parties often minimize collective action problems, they are ordinarily representative only of today's constituency. Budget deficits are in part a consequence of the fact that future generations are unable to be counted in today's electorate. See J. BUCHANAN & R. WAGNER, *DEMOCRACY AND DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* 17-18 (1977). A successful civic virtue approach might be better able to confront this problem, although the recent experience on the deficit tends to suggest otherwise. See *supra* notes 84-91 and accompanying text.

<sup>268</sup> See *supra* note 244 and accompanying text.

selves be more ideological. To the extent that such a system can be developed, emphasis would be placed more on stimulating dialogue between central party leaders, rather than between individual members of Congress over each specific piece of legislation. Moreover, particularistic private-regarding incentives and party discipline could be used to bind members of the party together.<sup>269</sup>

Whichever strategies are explored,<sup>270</sup> however, there is a need to focus on the entire system, not on individual pieces of legislation or individual members of Congress. Particularistic private-regarding incentives are powerful tools for facilitating the independence of individual legislators from their narrow home constituencies, a primary goal of the civic virtue writers, and for binding groups together into majority coalitions, a primary goal of the political party advocates. A constitutional system that views such incentives as unconstitutional may serve to undermine the goals of both democracy and virtue.

On balance, it is not surprising that the pursuit of civic virtue should appear so attractive; it provides a distinct legal solution to two problems that have vexed economists and political scientists—externalities and private interest groups. Civic virtue, as an extension of the old legal process perspective, seeks to solve these problems by positing a dialogue that will make government actors considerate of those outside their coalition, as well as more thoughtful about their own constituency. In pursuing this approach, however, we should not ignore the insights of economics and political science. If we do, we may run the risk of compounding the problem.

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<sup>269</sup> Ideological parties are certainly no panacea. The difficulties in creating strong (let alone ideological) parties have been debated at length in the political science literature, and are beyond the scope of this Article. *See supra* text accompanying notes 151-58 (describing techniques for strengthening parties). Moreover, even if we could return to a more responsive two party system, many political scientists view strong ideological politics as inherently divided and ultimately self-defeating. *See supra* text accompanying notes 240-47. Conversely, there is some question whether ideological parties are indeed principled or deliberative in the full sense envisioned by civic virtue advocates. Nevertheless, the purpose of their proponents is to accommodate the goals of democracy (or centralization) and deliberation. *See AMERICAN POLITICAL SCIENCE ASS'N, supra* note 115. In this sense, they may serve some of the objectives of both traditions.

<sup>270</sup> It is not my purpose to advocate these alternatives. They raise a host of other issues and potential problems that would have to be examined. *See, e.g.,* M. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, (forthcoming in 97 *YALE L.J.* (1988)).

